

BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL FINANCE
AND MONETARY POLICY

AND THE

SUBCOMMITTEE ON SECURITIES

OF THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN
AFFAIRS

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 414

TO AMEND AND CLARIFY THE FOREIGN CORRUPT PRACTICES ACT OF
1977

FEBRUARY 24, 1983

Printed for the use of the Committee on Banking, Housing, and Urban Affairs



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THE BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT

THURSDAY, FEBRUARY 24, 1983

U.S. SENATE, COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS, SUBCOMMITTEE ON INTERNATIONAL FI-
NANCE AND MONETARY POLICY AND SUBCOMMITTEE ON
SECURITIES,

Washington, D.C.

The subcommittees met jointly at 2:33 p.m. in room SD-538 of the Dirksen Senate Office Building; Senator John Heinz, chairman of the Subcommittee on International Finance and Monetary Policy, and Senator Alfonse M. D'Amato (chairman of the Subcommittee on Securities), presiding.

Present: Senators Heinz, D'Amato, Hawkins, Proxmire, and Lautenberg.

Senator D'AMATO [presiding]. The Senate Banking Committee, Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities is holding this hearing on S. 414.

Senator HEINZ. Hello, Mr. Chairman.

Senator D'AMATO. Hello, Mr. Chairman. In the interest of time I will submit my opening remarks for the record and ask that they be inserted at this point as though read.

[Statement follows:]

OPENING STATEMENT OF SENATOR D'AMATO

Today the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy continue hearings on S. 414 the Business Accounting and Foreign Trade Simplification Act. S. 414 was the subject of much discussion in the 97th Congress. At that time representatives of the Reagan administration testified that the Foreign Corrupt Practices Act was unnecessarily complex and confusing, and that some of its prohibitions were so broad as to cause major problems for American Businesses which are not seeking to violate any laws. Rather, it appears that legitimate business opportunities are being lost and unnecessary compliance costs are being incurred without substantial benefit to our country.

Today's hearing will provide us with an opportunity to hear from witnesses who are the most affected by the act. I am hopeful that their testimony will be of such a nature that will allow S. 414 to move quickly through this committee and through the full Senate.

I would like to commend Senator Chaffee, who was the original sponsor of this bill in the 97th Congress. He worked tirelessly in the last Congress to reach a compromise in the Senate. Senator

Proxmire's efforts in reaching a compromise should also be noted. Yet in spite of the efforts of Senators Chafee, Heinz, and myself we were unable to reach agreement with the House. As the Foreign Corrupt Practices Act stands now it has a chilling effect on the desire of American corporations to conduct business overseas. It is in no one's interest to allow this law to remain unchanged. There is no one on this committee who condones the use of bribery as a tool in conducting business overseas. I am hopeful that for the sake of the U.S. economy we in the Senate can move quickly to pass S. 414 which was already passed by this body in the last Congress, and then work with the House to reach an accord in an expeditious fashion.

Senator D'AMATO. I would be remiss if I did not indicate my strong sense of urgency in dealing with S. 414, and also if I did not commend Senator Chafee, our first witness, who was the original sponsor of this bill in the 97th Congress.

Senator Chafee worked tirelessly in the last Congress to reach a compromise. Senator Proxmire's efforts to reach an accord should also be noted. Yet in spite of their efforts—the efforts of Senator Chafee, Senator Heinz, Senator Proxmire and myself—we were unable to reach an agreement with the House.

As the Foreign Corrupt Practices Act stands now, it still has a chilling effect on the desire of American corporations to conduct business overseas. It is in no one's interest to allow a law that impedes commerce to continue in this way. I am hopeful that for the sake of the U.S. economy we on the committee and the Senate can move quickly to pass S. 414 once again, and that hopefully we will be able to work out an accord in an expeditious fashion.

Senator Heinz?

Senator HEINZ. Thank you very much, Chairman D'Amato. Let me say at the outset that I am very pleased to be able to join you in this hearing. It does signal a renewal of our effort that we began 2 years ago. Despite the best efforts that you refer to, and particularly Senator Chafee, who will be our leadoff witness, we did not succeed in enacting the bill.

I would ask that my entire lengthy statement be made a part of the record as though read.

[Opening statement follows:]

OPENING STATEMENT OF SENATOR HEINZ

Today's hearing renews an effort that began in 1981. Despite the best efforts of many of us, particularly Senator Chafee, who is back with us today, we did not succeed in enacting this bill.

As a result, uncertainly in the business community continues, export opportunities are foregone, and actual sales are lost. In short, we continue to shoot ourselves in the foot.

The real tragedy is that this waste can be avoided without compromising the law's objective. Those of us who support this bill also oppose bribery as much as anyone. What we seek to do is eliminate uncertainty and ambiguity that prevent legal activities as well as illegal ones.

Extensive hearings which Senator D'Amato and I held in 1981 demonstrated those uncertainties and their impact beyond any

question. The bill we fashioned was approved in committee by a bipartisan majority. It was approved by the full Senate without significant controversy. Even our colleague, Senator Proxmire, who did not support the bill, had some kind things to say about the compromises we struck on certain parts of it. In my judgment, the bill we produced was a fair compromise which significantly reduced the uncertainties of current law.

Unfortunately, we were unable to convince key Members in the House of the merits of the bill, despite sustained negotiations throughout 1982. In that regard we owe a great debt to Senator Chafee, whose efforts to reach agreement were heroic. He put countless personal hours into this task and went more than half-way in trying to accommodate the House. His departure from this committee is our loss, but I hope he will be able to continue working with us to enact the bill. Senator D'Amato and I need his contribution.

With respect to the substance of the bill, let me say that we have introduced the Senate-passed bill to accommodate those Senators who prefer it and because we believe it to be an acceptable improvement over current law. That does not mean we are unmindful of the progress made in negotiations between Senator Chafee and Congressman Wirth, particularly in the accounting sections of the bill. We are also aware of the remaining disagreements—on the “reason to know” and “grease” provisions in particular.

Committee members may wish to propose some of those agreements in our markup in an effort to facilitate an ultimate conference. While I, for one, would not at this point say I intend to oppose any changes in the bill, I do think that the appropriate place for compromise is in conference and not here in committee or on the Senate floor. While the committee will no doubt want to make some changes reflecting further thought and study since 1981, I will be inclined to oppose major changes in S. 414, which is identical to the bill passed by the Senate in 1981.

Today's hearing will in many respects reprise those in 1981. Ambassador Brock and Secretary Baldrige are here again from the administration, as is Chairman Shad from the SEC. One of our expert witnesses from the private sector also appeared before the committee in 1981. It is my hope to quickly reestablish the rationale and need for the bill so that we can quickly move on to markup.

Senator HEINZ. I would observe, since we were unsuccessful in 1982, the uncertainty in the business community continues. Export opportunities are being foregone and actual sales are being lost, and in short, because we have been unable to enact the Senate-passed bill, we continue to shoot ourselves in the foot.

The real tragedies, in my judgment, are the wages lost, jobs lost, lost export opportunities and the lost sales all of which could be avoided without compromising the objectives of existing law.

Those of us who support this bill oppose bribery just as much as anyone. What we seek to do is to eliminate the uncertainty and the ambiguity that prevent proper and legal activities as well as illegal ones.

There were extensive hearings that Senator D'Amato and I held in 1981. They demonstrated, I believe, the uncertainties are very real; that their impact is beyond any question.

The bill that we passed was approved by the full Senate without significant controversy. Even my friend and colleague, Senator Proxmire, who is here and who did not support the bill, had some kind things to say about the compromise we struck on certain parts of it. And in my judgment the bill that we produced is a fair compromise which significantly reduced the uncertainties in existing law.

As we all know, we were not able to convince key Members of the House—that includes Ambassador Brock and others—of the merits of the bill, despite, as Senator Chafee knows, an extraordinarily sustained negotiation in 1982.

We do owe Senator Chafee an enormous debt of gratitude. He, in my judgment, made an heroic effort to negotiate a settlement. He put countless personal hours into that task, he went more than halfway and tried to accommodate the House.

Let me also add, as a personal note, that his departure from this committee is indeed a very great loss, but I hope he will be able to continue, as he is today, to work with us, to help us enact a bill, and I think I speak for Senator D'Amato and myself when I say, Senator Chafee, we will continue to need your contribution.

With respect to the substance of the bill, let me say that what we have introduced—Senators Chafee, D'Amato, and myself—is the Senate/House-passed bill from last year. We introduced that bill to accommodate those Senators that prefer it and because we believe that it is a very acceptable improvement over current law.

That does not mean we are unmindful of the progress that was made in negotiation between Senator Chafee and Congressmen—or especially in the accounting section, but we also have disagreements on reason to know on the ERISA provisions in particular.

Committee members may wish to oppose some of those agreements in our mark-up in an effort to facilitate an ultimate conference. While I, for one, would not at this point say I intend to oppose any changes in the bill, I do think that the appropriate place for compromise on this bill, particularly as we've introduced it, is in conference and not here in committee or on the Senate floor.

While the committee no doubt will want to make changes reflecting further thought and studies since 1981, I will frankly be inclined to oppose major changes in S. 414, which is identical, as I mentioned, to the bill we passed in the last Congress.

Mr. Chairman, I thank you for yielding. I commend you on holding these hearings, and that we can hold them jointly this way.

Senator D'AMATO. Senator Proxmire?

Senator PROXMIRE. Thank you, Mr. Chairman. I guess I am the villain today.

Senator D'AMATO. Oh, no.

OPENING STATEMENT OF SENATOR PROXMIRE

Senator PROXMIRE. The author of the original bill passed in 1977—I have great admiration for the two outstanding gentlemen who are sitting at the witness table and will testify along with other witnesses today.

The Foreign Corrupt Practices Act passed the Congress unanimously in 1977, as we recall, with—it incidentally was a unique effort by this country, the only country in the world that has done this kind of thing, and I think it was one of the most important useful bills that we have had passed for many reasons.

As we know, its provisions were an outgrowth of the domestic and foreign bribery scandals uncovered by the SEC during the 1970's. According to the SEC, over 400 companies subject to its jurisdiction made over \$300 million in questionable or illegal payments upon government officials to obtain business with foreign governments or in foreign markets.

Foreign policy implications were very, very serious indeed, as we recall. Japan, a democratic government, felt the effects, of which are still being felt in Japan. The Netherlands monarchy was tarnished; in Italy, a key NATO ally in the Mediterranean, the Communists were given a leg up in elections; Third World democracies particularly, which need to nurture democratic institutions, were corrupted and lost faith in America. It has been said that the bribery disclosures tarnish our image as the world's leading democracy.

Domestically, American corporate management learned to do business by bribery, derogating free market principles of sale, based on price and quality.

Companies which refused to bribe were disadvantaged competitively. Corporate managers and boards of directors looked the other way while the companies established huge off-the-book slush funds, which were used to bribe foreign government officials.

I think this action we took in 1977 was not only the right thing to do from a moral and ethical standpoint but I have yet to see any hard evidence that it cost as jobs or cost us exports.

I think it helped. I think to have this country as the one country in the world that had a law, and an effective law, outlawing bribery would—help our exporters, and as I see, I have yet to see evidence that it did not.

Since that time there has not been any evidence of the kind of bribery that was suffered before the law became a law. I think that is an action that we should be very, very careful about amending.

I would agree that the effort made by—led by Senator Chafee and others, by the time it passed this Senate was a moderate bill. It had some real advantages.

I still do not see why we have to change what we have on the books. I hope we are very careful in doing so.

Senator D'AMATO. Senator Hawkins?

OPENING STATEMENT OF SENATOR HAWKINS

Senator HAWKINS. I would like to add my commendations, to my esteemed colleague, Senator Chafee. I have watched his hand at work in many efforts to make needed reforms. And this one is way overdue.

I don't believe that any country has a corner on morality. I think just reading the front page of today's paper would give us all pause to reflect. I don't believe you can legislate morality, I believe it is a quality we either have or we do not have.

By all accounts that I have read, this law has been a major source of reduced U.S. exports at a time when American jobs are most dependent upon an increase. Therefore, I commend you, Senator Chafee and Senator D'Amato for taking up this difficult issue.

I would also like to take a minute and welcome my good friend Ambassador Brock back. I would like to see him as often as possible. I may be sitting in your chair. I don't know if this was the seat you occupied or not on the Banking Committee. I know you were a member of the Banking Committee and I would like to report to you that I even hired your former banking assistant, Mr. Abshire to coach me. Maybe I will be as good a member of this committee as you were. You certainly have been an outstanding trade representative. I am hopeful that some progress is being made in resolving the most difficult problems you face. I am looking forward to learning a lot as a member of this body.

Thank you, Mr. Chairman.

Senator D'AMATO. Senator Lautenberg?

Senator LAUTENBERG. Thanks, Mr. Chairman. I have no statement. I agree with Senator Hawkins that I am pleased to be here and that I am here for a learning more than a teaching experience, and I will listen patiently and then perhaps I will have something to say.

Senator D'AMATO. Let us insert in the record at this point a copy of the bill being considered.

[Copy of S. 414 follows:]

98TH CONGRESS
1ST SESSION

S. 414

To amend and clarify the Foreign Corrupt Practices Act of 1977.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 3 (legislative day, JANUARY 25), 1983

Mr. HEINZ (for himself, Mr. CHAFEE, Mr. GARN, and Mr. D'AMATO) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To amend and clarify the Foreign Corrupt Practices Act of 1977.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Business Accounting and
4 Foreign Trade Simplification Act".

5 FINDINGS AND CONCLUSIONS

6 SEC. 2. (a) The Congress finds that—

7 (1) the enactment of the Foreign Corrupt Prac-
8 tices Act of 1977 was a positive and significant step
9 toward the important objective of prohibiting bribery of

1 foreign government officials by United States compa-
2 nies in order to obtain, retain, or direct business;

3 (2) the Foreign Corrupt Practices Act of 1977 has
4 caused unnecessary concern among existing and poten-
5 tial exporters as to the scope of legitimate overseas
6 business activities;

7 (3) the accounting standards requirements of the
8 Foreign Corrupt Practices Act of 1977, which apply to
9 all issuers of securities irrespective of whether they
10 have foreign operations, are unclear and excessive and
11 have caused costly and unnecessary paperwork bur-
12 dens;

13 (4) United States agencies responsible for enforce-
14 ment of the Foreign Corrupt Practices Act of 1977
15 have not sufficiently coordinated interpretation and en-
16 forcement practices with other agencies responsible for
17 international trade policy, export promotion, foreign
18 policy, international monetary policy, and other related
19 civil and criminal statutes; and

20 (5) it is in the best interests of all countries to
21 maintain responsible standards of corporate conduct in
22 foreign markets to preserve free and equitable trading
23 practices.

24 (b) The Congress concludes that—

1 (1) the principal objectives of the Foreign Corrupt
2 Practices Act of 1977 are desirable, beneficial, and im-
3 portant to our Nation as well as to our relationships
4 with our trading partners, and these objectives should
5 remain the central intent of the Act;

6 (2) exporters should not be subject to unclear,
7 conflicting, and potentially damaging demands by di-
8 verse United States agencies responsible for enforce-
9 ment of the Foreign Corrupt Practices Act of 1977;

10 (3) general compliance and enforcement practices
11 associated with the Foreign Corrupt Practices Act of
12 1977 should be developed in accordance with consider-
13 ations underlying foreign relations, international trade,
14 export promotion, international monetary policy, and
15 other related civil and criminal statutes; and

16 (4) a solution to the problem of corrupt payments
17 by firms to obtain or retain business demands and in-
18 ternational approach; accordingly, appropriate interna-
19 tional agreements should be initiated and sought by the
20 United States agencies responsible for trade agree-
21 ments and by the President.

22 AMENDMENT OF SHORT TITLE

23 SEC. 3. Section 101 of the Foreign Corrupt Practices
24 Act of 1977 is amended to read as follows:

1

"SHORT TITLE

2

"SEC. 101. This title may be cited as the 'Business Practices and Records Act'."

4

ACCOUNTING STANDARDS

5

SEC. 4. (a) Section 13(b)(2) of the Securities Exchange Act of 1934 is amended to read as follows:

7

"(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

13

"(A) transactions are executed in accordance with management's general or specific authorization;

15

"(B) transactions are recorded as necessary (i) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (ii) to maintain accountability for assets;

20

"(C) access to assets is permitted only in accordance with management's general or specific authorization;

23

"(D) the recorded accountability for assets is compared with the existing assets at reasonable intervals

24

1 and appropriate action is taken with respect to any dif-
2 ferences; and

3 “(E) for the purposes of subparagraphs (A)
4 through (D) of this paragraph, the issuer makes and
5 keeps books, accounting records, and accounts which,
6 in reasonable detail, accurately and fairly reflect the
7 transactions and dispositions of the assets of the
8 issuer.”.

9 (b) Section 13(b) of the Securities Exchange Act of
10 1934 is amended by adding at the end thereof the following:

11 “(4) No criminal liability shall be imposed for failing to
12 comply with the requirements of paragraph (2) of this subsec-
13 tion.

14 “(5) No civil injunctive relief shall be imposed with re-
15 spect to—

16 “(A) any issuer for failing to comply with the re-
17 quirements of paragraph (2) of this subsection if such
18 issuer shall show that it acted in good faith in attempt-
19 ing to comply with such requirements; or

20 “(B) any person other than an issuer, in connec-
21 tion with an issuer’s failure to comply with paragraph
22 (2), unless such person knowingly caused the issuer to
23 fail to devise or maintain a system of internal account-
24 ing controls that complies with paragraph (2).

1 “(6) No person shall knowingly circumvent a system of
2 internal accounting controls established pursuant to para-
3 graph (2) for a purpose inconsistent with paragraph (2).

4 “(7) Where an issuer which has a class of securities
5 registered pursuant to section 12 of this title or an issuer
6 which is required to file reports pursuant to section 15(d) of
7 this title holds 50 per centum or less of the voting power
8 with respect to a domestic or foreign firm, the provisions of
9 paragraph (2) require only that the issuer proceed in good
10 faith to use its influence, to the extent reasonable under the
11 issuer's circumstances, including the relative degree of its
12 ownership over the domestic or foreign firm and under the
13 laws and practices governing the business operations of the
14 country in which such firm is located, to cause such domestic
15 or foreign firm to devise and maintain a system of internal
16 accounting controls consistent with paragraph (2). Such an
17 issuer shall be conclusively presumed to have complied with
18 the provisions of paragraph (2) by demonstrating good faith
19 efforts to use such influence.”.

20 REPEALER; NEW BRIBERY PROVISION

21 SEC. 5. (a)(1) Section 30A of the Securities Exchange
22 Act of 1934 is repealed.

23 (2) Section 32 of such Act is amended—

24 (A) by striking out “(other than section 30A)” in
25 subsection (a); and

1 (B) by striking out subsection (c).

2 (b) Section 104 of the Business Practices and Records

3 Act is amended to read as follows:

4 "FOREIGN PAYMENTS

5 "SEC. 104. (a) It shall be unlawful for any domestic
6 concern, or any officer, director, employee, or shareholder
7 thereof acting on behalf of such domestic concern, to make
8 use of the mails or any means or instrumentality of interstate
9 commerce corruptly in furtherance of a payment, gift, offer,
10 or promise, directly or indirectly, of anything of value to any
11 foreign official for the purpose of—

12 "(1) influencing any act or decision of such foreign
13 official in his official capacity, or inducing such foreign
14 official to do or omit to do any act in violation of his
15 legal duty as a foreign official; or

16 "(2) inducing such foreign official to use his influ-
17 ence with a foreign government or instrumentality
18 thereof to affect or influence any act or decision of
19 such government or instrumentality;

20 in order to assist such domestic concern in obtaining or re-
21 taining business for or with, or directing business to, any
22 person.

23 "(b) It shall be unlawful for any domestic concern, or
24 any officer, director or employee, or shareholder thereof
25 acting on behalf of such domestic concern to make use of the

1 mails or any means or instrumentality of interstate commerce
2 corruptly to direct or authorize, expressly or by a course of
3 conduct, a third party in furtherance of a payment, gift, offer,
4 or promise of anything of value to a foreign official for any of
5 the purposes set forth in subsection (a).

6 “(c) Subsections (a) and (b) shall not apply to—

7 “(1) any facilitating or expediting payment to a
8 foreign official the purpose of which is to expedite or to
9 secure the performance of a routine governmental
10 action by a foreign official;

11 “(2) any payment, gift, offer, or promise of any-
12 thing of value to a foreign official which is lawful
13 under the law and regulations of the foreign official’s
14 country;

15 “(3) any payment, gift, offer, or promise of any-
16 thing of value which constitutes a courtesy, a token of
17 regard or esteem, or in return for hospitality;

18 “(4) any expenditures, including travel and lodg-
19 ing expenses, associated with the selling or purchasing
20 of goods or services or with the demonstration or ex-
21 planation of products; or

22 “(5) any ordinary expenditures, including travel
23 and lodging expenses, associated with the performance
24 of a contract with a foreign government or agency
25 thereof.

1 “(d)(1)(A) Except as provided in subparagraph (B), any
2 domestic concern which violates subsection (a) or (b) shall,
3 upon conviction, be fined not more than \$1,000,000.

4 “(B) Any individual who is a domestic concern and who
5 willfully violates subsection (a) or (b) shall, upon conviction,
6 be fined not more than \$10,000, or imprisoned not more than
7 five years, or both.

8 “(2) Any officer or director of a domestic concern, or
9 stockholder acting on behalf of such domestic concern, who
10 willfully violates subsection (a) or (b) shall, upon conviction,
11 be fined not more than \$10,000, or imprisoned not more than
12 five years, or both.

13 “(3) Whenever a domestic concern is found to have vio-
14 lated subsection (a) or (b) of this section, any employee of
15 such domestic concern who is a United States citizen, nation-
16 al, or resident or is otherwise subject to the jurisdiction of the
17 United States (other than an officer, director, or stockholder
18 acting on behalf of such domestic concern), and who willfully
19 carried out the act or practice constituting such violation
20 shall, upon conviction, be fined not more than \$10,000, or
21 imprisoned not more than five years, or both.

22 “(4) Whenever a fine is imposed under paragraph (2) or
23 (3) of this subsection upon any officer, director, employee, or
24 stockholder of a domestic concern, such fine shall not be paid,
25 directly or indirectly, by such domestic concern.

1 “(e)(1) When it appears to the Attorney General that
2 any domestic concern, or officer, director, employee, or
3 stockholder thereof, is engaged, or is about to engage, in any
4 act or practice constituting a violation of subsection (a) or (b)
5 of this section, the Attorney General may, in his discretion,
6 bring a civil action in an appropriate district court of the
7 United States to enjoin such act or practice, and upon a
8 proper showing, a permanent or temporary injunction or a
9 temporary restraining order shall be granted without bond.

10 “(2) For the purpose of all civil investigations which, in
11 the opinion of the Attorney General, are necessary and
12 proper for the enforcement of this Act, the Attorney General
13 or any attorney or attorneys of the Department of Justice
14 designated by him are empowered to administer oaths and
15 affirmations, subpoena witnesses, take evidence, and require
16 the production of any books, papers, or other documents
17 which the Attorney General deems relevant or material to
18 the inquiry. Such attendance of witnesses and the production
19 of such documentary evidence may be required from any
20 place in the United States, or any territory, possession, or
21 commonwealth of the United States, at any designated place
22 of hearing.

23 “(3) In case of contumacy by, or refusal to obey a sub-
24 pena issued to, any person, the Attorney General may invoke
25 the aid of any court of the United States within the jurisdic-

tion of which such investigation or proceeding is carried on,
or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or attorney designated by the Attorney General, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. The Attorney General shall have the power to make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

“(f) As used in this section—

“(1) The term ‘domestic concern’ means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States, which has a class of secu-

1 rities registered pursuant to section 12 of the Securi-
2 ties Exchange Act of 1934, or which is required to file
3 reports under section 15(d) of the Securities Exchange
4 Act of 1934.

5 “(2) The term ‘foreign official’ means (A) any offi-
6 cer or employee of a foreign government or any de-
7 partment, agency, or instrumentality thereof, or any
8 person acting in an official capacity for or on behalf of
9 any such government or department, agency, or instru-
10 mentality; or (B) any foreign political party or official
11 thereof or any candidate for foreign political office.”.

12 DEFINITIONS

13 SEC. 6. Section 13(b) of the Securities Exchange Act of
14 1934 is amended by adding at the end thereof the following:

15 “(6) For the purpose of this section, the terms ‘reason-
16 able assurances’ and ‘reasonable detail’ mean such level of
17 detail and degree of assurance as would satisfy prudent indi-
18 viduals in the conduct of their own affairs, having in mind a
19 comparison between benefits to be obtained and costs to be
20 incurred in obtaining such benefits.”.

21 EXCLUSIVITY PROVISION FOR OVERSEAS BRIBERY

22 SEC. 7. No criminal action pursuant to section 1341 or
23 1343 of title 18, United States Code, may be brought against
24 a domestic concern, its officers, directors, employees, or any
25 shareholders thereof acting on behalf of such domestic con-

cern for a payment, gift, offer, or promise to a foreign official based upon the theory that the foreign official or the domestic concern violated a duty to or defrauded the foreign government or the citizens of a foreign country.

AUTHORITY TO ISSUE GUIDELINES

SEC. 8. Title I of the Business Practices and Records Act is amended by adding at the end thereof the following:

“GUIDELINES AND GENERAL PROCEDURES FOR COMPLIANCE

“SEC. 105. (a) Not later than six months after the date of enactment of this section, the Attorney General, after consultation with the United States Trade Representative, the Secretary of State, the Secretary of Commerce, and the Secretary of the Treasury, and after consultation with representatives of the business community and the interested public through public notice and comment and in public hearings, shall determine to what extent the business community would be assisted by further clarification of section 104 of this Act and shall, based on such determination and to the extent necessary and appropriate, have the authority to issue—

“(1) guidelines describing specific types of conduct associated with common types of export sales arrangements and business contracts which the Attorney Gen-

1 eral determines constitute compliance with the provi-
2 sions of section 104 of this Act; and

3 “(2) general precautionary procedures which issu-
4 ers or domestic concerns may use on a voluntary basis
5 to ensure compliance with this Act, and to create a re-
6 buttable presumption of compliance with this Act.

7 The guidelines and procedures referred to in the preceding
8 sentence shall be issued in accordance with sections 551
9 through 557 of title 5, United States Code.

10 “(b) The Attorney General, after consultation with
11 other Federal agencies and representatives from the business
12 community, shall establish a Business Practices and Records
13 Act Review Procedure for the purposes of providing re-
14 sponses to specific inquiries concerning enforcement inten-
15 tions under this Act. The Attorney General shall issue opin-
16 ions, within thirty days, in response to requests from domes-
17 tic concerns, regarding compliance with the requirements of
18 the provisions of section 104 of this Act. An opinion that
19 certain prospective conduct does not involve a violation shall
20 be final and binding on all parties, subject to the discovery of
21 new evidence. When appropriate, and at reasonable inter-
22 vals, the responses derived from the review procedure will be
23 reviewed by the Attorney General to determine whether such
24 compilation of responses should be included in a new guide-
25 line pursuant to subsection (a).

1 “(c) Any document or other material provided to, re-
2 ceived by, or prepared in the Department of Justice, or any
3 other department or agency of the United States Govern-
4 ment, in connection with a request by a domestic concern for
5 a statement of present enforcement intentions under the
6 Business Practices and Records Act Review Procedure pur-
7 suant to subsection (b) of this section, or in connection with
8 any investigations conducted to enforce this Act, shall be
9 exempt from disclosure under section 552 of title 5, United
10 States Code, regardless of whether the Department responds
11 to such a request or the applicant withdraws such request
12 prior to receiving a response. The Attorney General shall
13 protect the privacy of each applicant, and shall adopt rules
14 assuring that materials, documents, and information submit-
15 ted in connection with a review procedure request will be
16 kept confidential and will not be used for any purpose that
17 would unnecessarily discourage use of the review procedure.
18 The review procedure shall be developed and instituted in
19 accordance with sections 551 through 557 and 701 through
20 706 of title 5, United States Code.

21 “(d) The Attorney General shall make a special effort to
22 provide timely compliance guidance to potential exporters,
23 and smaller businesses, who as a practical matter are unable
24 to obtain specialized counsel on issues pertaining to this Act.
25 Such assistance shall be limited to requests for enforcement

1 intention disclosures provided for under this Act, and general
2 explanations of compliance responsibilities and of potential
3 liabilities under the Act.

4 “(e)(1) On September 1 of each year the Attorney Gen-
5 eral shall transmit to the Congress and make public a de-
6 tailed report on all actions which the Department of Justice
7 has taken pursuant to this Act, along with its views on prob-
8 lems associated with implementation, its plan for the next
9 fiscal year to further implement the Act, and r ecommenda-
10 tions for amendments.

11 “(2) On September 1 of each year the Chairman of the
12 Securities and Exchange Commission shall file with the Con-
13 gress a detailed report on all actions which the Commission
14 has taken pursuant to section 13(b) of the Securities Ex-
15 change Act, its views on problems associated with implemen-
16 tation, its plans for the next fiscal year to further implement
17 such section, and its recommendations for amendment.”.

18 INTERNATIONAL AGREEMENTS

19 SEC. 9. (a) It is the sense of the Congress that the
20 President should pursue the negotiation of an international
21 agreement among the largest possible number of nations on
22 illicit payments, including a process by which problems and
23 conflicts associated with such practices could be resolved.

24 (b) Within one year after the date of enactment of this
25 Act, the President shall report to Congress on—

1 (1) the progress of the negotiations referred to in
2 subsection (a);

3 (2) those steps which the administration and Con-
4 gress should consider taking in the event that these ne-
5 gotiations do not successfully eliminate the competitive
6 disadvantage of United States business; and

7 (3) possible actions that could be taken to promote
8 cooperation by other nations in international efforts to
9 prevent bribery of foreign officials, candidates, or par-
10 ties in third countries.

11 This report shall also include recommendations for any new
12 legislation required to give the President authority to take
13 appropriate action to achieve such objectives. The report
14 shall contain an analysis of the potential effect on the inter-
15 ests of the United States including United States national
16 security of the corruption of foreign officials and political
17 leaders in connection with international business transactions
18 involving persons and business enterprises of other nations.
19 In addition, the report shall assess the current and future rule
20 in curtailing such corruption of private initiatives such as the
21 Recommendations to Government and Rules of Conduct to
22 Combat Extortion and Bribery developed by the Internation-
23 al Chamber of Commerce.

Senator D'AMATO. We are delighted to proceed with our witnesses. Our first witnesses are Senator Chafee and Ambassador Brock. I think both of you have some time constraints.

Ambassador Brock, the Senator has indicated he is amenable to your testifying first, and Bill, it is good to see you.

STATEMENT OF WILLIAM BROCK, U.S. TRADE REPRESENTATIVE

Ambassador Brock. I am grateful, particularly since it is the author of the original bill who has yielded his time to me.

I note the various compliments that have been paid to Senator Chafee. I can only echo those and add my own appreciation for what has been a noble and difficult labor of love on his part. It is an important issue.

As the U.S. Trade Representative, I have appeared before this committee on several occasions to discuss the promotion of international trade and my office's efforts to eliminate impediments which hinder U.S. exporters' access to foreign markets.

I come before you today to report on one of our most serious trade barriers. It is not a foreign subsidy or a local content requirement. It does not exist in Japan or Europe or among the lesser-developed nations.

Ironically, it is a trade barrier of our own creation, and it is costing the unnecessary loss of American jobs every day. We cannot afford to lose those jobs, Mr. Chairman.

The Foreign Corrupt Practices Act may be our most serious trade problem at the moment because it is self-imposed, one that comes not from the fact that we have stood alone as a nation against international bribery, but because we have done so in an ambiguous way.

Thus, I am here today to express the administration's strong support for S. 414, reform amendments to the Foreign Corrupt Practices Act. This bill represents a continuation of the bipartisan work that we came so close to finishing in the last Congress.

There should be no question as to whether after 5 years of extensive criticism of the current act raised by the Department of Justice, the Securities and Exchange Commission, the Joint Economic Committee of the Congress, the General Accounting Office, the National Governors' Association and a host of others, that we need to act immediately to deal with the problems created by the Foreign Corrupt Practices Act.

There should be no debate on the issue of whether we need a strong law on the books to maintain the integrity of corporate conduct overseas. There should be no discussion of whether illicit payments, either foreign or domestic, are unethical, undesirable, and illegal.

Because there has been so much confusion about the Foreign Corrupt Practices Act not only as Congress goal of prohibiting bribes been obscured, but another important goal, namely, export promotion, has been undermined.

For these reasons, the administration urges this committee to approve this legislation and send it to the House. Thanks to the concerted efforts of Senator John Chafee and the Senate Banking

Committee, useful discussions took place between the House and Senate last year; however, but a final resolution was not achieved.

Our statement, as I mentioned, is clear on the issue of illicit payment. Yet, once the U.S. business community and the U.S. Government stand together in support of a workable law like S. 414 which respects the laws and customs of other nations, our credibility and influence as a world leader against bribery will be greatly enhanced.

My office offers its continued assistance to you and this committee on the issue. I would be very grateful for quick and effective action to improve this law.

Thank you, Mr. Chairman.

[Complete statement of Ambassador Brock follows:]

TESTIMONY OF WILLIAM E. BROCK, U.S. TRADE REPRESENTATIVE

As United States Trade Representative, I have appeared before this Committee on several occasions to discuss the promotion of international trade and my office's efforts to eliminate impediments which hinder U.S. exporters' access to foreign markets.

I come before you today to report on one of our most serious trade barriers. It is not a foreign subsidy or a local content requirement, it does not exist in Japan, or Europe, or among the lesser developed world. Ironically, it is a trade barrier of our own creation, and it is costing us the unnecessary loss of American jobs every day.

Mr. Chairman, we simply cannot afford to continue to lose those jobs.

Mr. Chairman, the Foreign Corrupt Practices Act may be our most serious trade problem because it is a self-imposed constraint that comes not from the fact that we have stood alone as a nation against international bribery, but because we have done so in an ambiguous way.

I am here today to express the Administration's strong support for S. 414, reform amendments to the Foreign Corrupt Practices Act. This bill represents a continuation of the bipartisan work that we came so close to finishing in the last Congress.

The Foreign Corrupt Practices Act, when proposed by this Committee in 1976 and 1977, as a statutory solution to the problem of overseas bribery, was a commendable undertaking.

Certainly, we are all against bribery and condemn the misuse of an official position for personal or monetary gain. In fact, there are almost no countries in the world that do not have an antibribery statute incorporated in their domestic laws.

There should be no debate on the issue of whether we need a strong law on the books to maintain the integrity of corporate conduct overseas. There should be no discussion of whether illicit payments, whether foreign or domestic are unethical and undesirable.

There should be no question as to whether after five years of extensive criticisms of the current Act raised by the Department of Justice, the Securities and Exchange Commission, the Joint Economic Committee, the General Accounting Office, the National Governor's Association and a host of others, that we need to act immediately to deal with the problems created by the current Act.

We all agree on these points and should proceed on the basis of that agreement. The Administration believes that S. 414 reflects that agreement.

PROBLEMS ENCOUNTERED UNDER THE FCPA

The problems that need to be addressed in amending the FCPA fall into two broad categories: (1) lack of clarity in drafting the initial legislation; and (2) unanticipated and unnecessary burdens created by the structure and requirements of the current Act.

The lack of clarity in drafting is most apparent in the case of "grease" payments. Congress exempted grease payments from the current Act based on the pragmatic realization that they are an unavoidable aspect of international commerce. The problem is that instead of describing the type and purpose of payments allowed under the statute, Congress defined the exemption by excluding low level officials performing ministerial or clerical duties from the definition of foreign official.

Thus, the exemption is buried in the Act and gives no useful guidance to the average businessperson as to what is ministerial and what is not. It is difficult enough to deal with the varieties of cultural practices and customs involved in international

commerce without having to deal with the added burden of trying to figure out what U.S. laws means. We have a responsibility to paint a bright line for our firms to follow so that they know exactly what Congress intended that they can and cannot do.

In the area of unanticipated consequences, over the last several years we have observed the chilling effect that the "reason to know" standard has had on the conduct of business overseas. It is particularly difficult for a U.S. company, large or small, to protect itself against the behavior of an agent in a foreign nation. Large corporations used hundreds, sometimes thousands, of sales agents throughout the world. Small companies, often attempting to export for the first time, must rely upon individuals about whom limited information is available at best.

In both cases, the burden of proof required by the Act rests upon the U.S. businessperson to demonstrate that he did not have a reason to know or suspect possible wrong-doing before the fact. This has proved to be an unreasonable and near impossible test to fulfill.

There is no need for this standard. We have no similar "reason to know" standard of responsibility in our domestic bribery laws. In fact, the Department of Justice prepared a carefully documented report last year stating that "reason to know" is patently unsuited for use as a standard governing liability . . . under the foreign bribery law (FCPA)". I submit that report for inclusion in the hearing record.

We ought to provide a clear standard in this area. The same should be the case with respect to the cost of complying with the accounting and recordkeeping requirements of the Act which have placed an excessive burden on all publicly held companies regardless of whether or not they make any foreign sales. The GAO study found that over 55 percent of the firms polled said they believe their efforts to comply with the Act's accounting provisions have cost more than the benefits received.

Here again, the FCPA demands that the businessperson determine his own "reasonable degree" of "accurate and fair" recordkeeping and internal controls.

Simply making an error in company books in the detail to which Securities and Exchange Commission deems necessary causes companies to violate the statute. One need not be engaged in corruption or foreign sales to violate the so-called Foreign Corrupt Practices Act.

Costly accounting procedures and ambiguities about what is a bribe not only cause U.S. companies to lose foreign orders, but retard competition in the first place.

U.S. firms regularly face such uncertainties, and dilemmas over whether or not to make a payment that is often legal in most countries. Unfortunately—for many jobless Americans and declining U.S. businesses—they choose to play it safe and simply not compete.

Those American exporters who have tried to compete within the letter and spirit of the law despite its ambiguities have discovered how costly the experience can be:

The U.S. Embassy in Oman reported that a U.S. firm lost a \$20-\$30 million contract largely because of time delays caused by the firm's lengthy struggle to insure FCPA compliance. Their compliance efforts involved investigating potential agents and assessing corporate responsibility for their actions.

A multinational U.S.-based engineering company spent approximately \$250,000 to evaluate its potential market in Latin America. One of the major reasons the company chose not to expand was its uncertain liability under the FCPA for the activities of independent agents and subcontractors. Moreover, the cost of policing such activities would have markedly lessened its price competitiveness.

In the Middle East, a large Utah firm encountered difficulty in its efforts to obtain a local representative. After many discussions, the U.S. company narrowed the field to one Omani firm which it felt could best represent its interests, but the Americans were unable to reach an agreement due to potential problems arising under the FCPA. Since the firm's business runs in multimillion dollar contracts involving high technology, lost U.S. exports were substantial.

A U.S. firm concluded a \$4 million contract for the supply of construction equipment. The American firm, in efforts to comply with the FCPA, then refused to pay an apparently legitimate commission to the foreign distributor. The distributor revoked the contract and purchased the equipment from a non-U.S. firm that was willing to pay the commission.

A large American firm was pursuing a joint venture agreement with a reputable Saudi firm. While negotiations were underway, the partners-to-be actively pursued a large Saudi government contract and received assurances they would get the award. In order to protect itself from the unknowns of the FCPA, the U.S. firm insisted on protective language in the contract. The Saudi firm was offended by inferences that

it and its officers were corrupt. Negotiations were extended at considerable cost. In the meantime the Government of Saudi Arabia, unwilling to wait any longer, awarded the contract to a third country firm. The joint venture failed to be worked out because of bad feelings which were generated in the contract negotiations and due to the loss of the contract.

It does not take long for horror stories such as these to spread throughout the exporting community and the private trade bar before a chilling effect has been created.

MAJOR PROVISIONS OF S. 414

S. 414, the newly introduced successor to S. 708, which passed the Senate by a voice vote during the last Congress solves these problems and provides assurances to businesses conducting legitimate overseas transactions.

The provisions embodied in S. 708, and now in S. 414, represent the results of many months of careful scrutiny and thoughtful debate. Thanks to the efforts of Senators Chafee, Heinz, D'Amato and other members of this Committee; bipartisan committee support; and the combined energies of the private sector and the Administration, the bill before us today provides the kinds of solutions that will allow U.S. exporters to compete abroad with greater certainty and clear understanding of their rights and responsibility under the FCPA.

The bill alleviates the major uncertainty that businessmen have faced with respect to the "reason to know" provision. S. 414 removes this standard, thereby making the Act more compatible with domestic bribery law, and substitutes the more appropriate requirement of "direction or authorization" of an illicit payment as a basis for liability.

The bill also makes enforcement of antibribery consistent and predictable by: (1) placing all antibribery enforcement responsibilities under the Department of Justice, (2) authorizing the Department of Justice to issue clear and comprehensive guidelines as to what is permissible conduct and what is not permissible conduct, and (3) providing that FCPA constitutes the exclusive substantive prohibition under the U.S. Code for overseas bribery.

S. 414 excludes from coverage certain payments that are customary in the country where made whose purpose is to secure performance of a routine governmental action. This approach represents a more logical and comprehensible solution to the question of "grease" payments, which are legal under current law, but which have been difficult to apply to real life situations.

In addition, S. 414 excludes from coverage payments which are: (1) lawful under the law of the foreign official's country; (2) gifts intended as token of esteem or return for hospitality; and (3) expenditures associates with selling or purchasing of good or services or performance of a contract. By detailing the kinds of payments excluded from the Act, U.S. firms will be more aware of what constitutes legal payments. This provision demonstrates a simple, common sense approach to the problem and promotes respect for laws of other nations.

With regard to the accounting provisions, S. 414 makes several important improvements to the law, including the decriminalization of the accounting provisions, and the establishment of a "good faith" defense to civil actions.

Further, the bill defines what constitutes "reasonable assurances" in the establishment of an internal accounting system, and re-establishes cost-benefit analysis by which businesses can determine the necessary practices needed to comply with the law. Both of these additions to the current law are badly needed and long overdue.

While it is important to delineate the important changes proposed by S. 414, it is perhaps more important to mention what is not changed by this legislation.

As amended, the Foreign Corrupt Practices Act will continue to make it unlawful for any U.S. company or any official, employee, director or shareholder of such company to pay, give, offer or promise anything of value to any foreign official for the purpose of influencing any act or decision of that foreign official or inducing the official to misuse his legal duty in order to obtain, retain, direct or maintain business.

When a U.S. corporation has been found to have violated the law, the penalty is a \$1 million fine. For individuals who directed or authorized such bribes to take place, the penalty is \$10,000 and/or 5 years in prison. By any measure, this is still the strongest, most pervasive extraterritorial antibribery law enacted by any country in the world.

The Administration believes that the provisions of S. 414 are faithful to the intent of Congress in 1977 when it attempted to prohibit illicit payments overseas. We feel

that this legislation, by clarifying ambiguities in the current law and by limiting excessive recordkeeping requirements which presently go far beyond international transactions, would do more to accomplish the original intent of the law. Because there has been so much confusion about the Foreign Corrupt Practices Act, not only has Congress' goal of prohibiting overseas overseas bribes been obscured, but another important goal of the Congress—namely, export promotion—has been undermined.

For these reasons, the Administration urges this committee to approve a bill and send it to the full Senate for consideration as soon as possible. At the same time, we would hope that the House of Representatives would take similar action. Thanks to the concerted efforts of Senator John Chafee and the Senate Banking Committee, useful discussions took place with the House last year. These discussions helped to build a bipartisan consensus on the need for specific FCPA reforms.

While the Administration supports productive dialogue between the Senate and the House, I offer the following points:

(1) The FCPA urgently needs reform; we urge Congress to act expeditiously to correct the problems raised by the exporting community.

(2) Legislation that does not fully address the problems encountered under the FCPA will be incomplete. Congress must provide the clarity and limits necessary to make the Act a law under which our exporters can compete.

CONCLUSION

Let us understand that the United States will continue to support and enforce a strong international antibribery law for its own citizens.

Our statement as a nation is clear on the issue of illicit payment. Our leadership toward international progress in this area will be strengthened because we will have demonstrated to our trading partners that it is possible to create a reasonable and fair, yet comprehensive and stringent prohibition against the bribing of foreign government officials.

Once the U.S. business community and the U.S. government stand together in support of a workable law of this type that respects the laws and customs of other nations, our credibility and influence as a world leader against bribery will be greatly enhanced.

Senator D'AMATO. Mr. Ambassador, I hope you can remain for some time, so that some questions may be addressed to you.

I would like to hear from Senator Chafee before we put any questions to you.

Senator CHAFEE. Thank you, Mr. Chairman. I do not know what the time constraints are on the Ambassador. I would be willing—I am perfectly prepared to defer my statement, in order to accommodate his time schedule, if you wish to ask him questions, in order that he might leave, if that is agreeable with the committee, whatever you wish. I am in no rush.

Senator D'AMATO. Inasmuch as the Ambassador does have time constraints placed on him of 10 or 15 minutes, why don't we ask him those questions that we feel are most important.

LAW BURDENSOME ON U.S. FIRMS

I have one, Mr. Ambassador. Previously, you stated that the Foreign Corrupt Practices Act placed more of a burden on small and medium-sized companies. Do you still support that statement?

Ambassador BROCK. Categorically yes. There is no question about the heavy burden placed on small and medium-sized companies. I frankly take pleasure in commending the former chairman of this committee for the initiative taken in trying to correct the obviously serious problem both in trade and in international political terms.

The problem with the current law is not one of intent. The problem is with the wording of the law and the ambiguity and complexity of the law. Large, major corporations have, as a matter of prac-

tice, a whole battery of corporate attorneys and accountants available to them all the time. The sheer number of experts alone helps in complying with the current law. Small companies simply do not have access to that kind of talent and expertise. Confronted with ambiguity and uncertainty in the law, the small and medium-size companies would rather play it safe and simply not compete than risk critical injury to their companies.

Senator D'AMATO. Mr. Ambassador, we recognize that you have been attempting to negotiate a treaty or an agreement that would bind other nations in joining together in clear, unambiguous language to prohibit bribery, official misuse of power and other objectionable forms of conduct. Do you believe that the passage of S. 414 will increase or diminish your ability to negotiate a multilateral agreement to prohibit bribery?

Ambassador BROCK. I think it would be somewhat helpful, but to be very honest with you, it will be a long time before most countries adhere to the kind of ethical standards which we place great importance on in this country.

It is true, I believe, that the present law is perceived by others as so burdensome upon U.S. firms, that there is little, if any, interest at all in negotiating an international agreement. A more effective law that would not be so burdensome, but instead clear in its effect, might make it easier for us to negotiate an international standard of business conduct.

Senator D'AMATO. Senator Heinz?

Senator HEINZ. Thank you, Mr. Chairman.

Ambassador Brock, every so often we do hear the arguments that the current law does not cost jobs, does not cost sales, and does not cost economic growth. They were made on the floor of the Senate when we took this bill up in 1981. They were made, I think, by Senator Proxmire a few minutes ago.

Would you like to address, from your point of view, what this bill, in fact, is costing us in the way of sales or jobs or economic growth?

Ambassador BROCK. This is one of the hardest questions in the world to answer, because of the difficulty in proving what does not happen. How does one quantify what does not happen? We have, from the General Accounting Office, which is a creature of the Congress, not of the executive, a report on the FCPA, based on their survey of 250 large companies: 55 percent of these firms reported complying with the accounting provisions resulting in costs that were greater than the benefits received; 30 percent of the companies engaged in foreign business reported that they had lost overseas business as a result of the act.

I can continue to give example after example about FCPA being a disincentive to trade. Surveys were made of our Embassies around the world. A number of them commented about the clear negative impact on the opportunities for American business. A countless number of people have said they simply have withdrawn from doing business in certain parts of the world. They will not even try to compete because of the complexity of our law in conjunction with the business, cultural and social practices of a particular geographic area.

I do not know how to answer the question in precise numerical terms. However, I do know there is substantial evidence that we are not doing as much business as we would otherwise do, if we had an enforceable, workable, and understandable law. At present, we do not have such a law.

Senator HEINZ. The last time you testified on this was two years ago, 1981. Has anything changed since 1981, since we acted on this legislation that would make this law, these changes, any less necessary today than a couple of years ago?

Ambassador BROCK. In my judgment, it is increasingly necessary to change the current law. We face a very difficult world competitive situation. For the first time in more than a generation, world trade declined in absolute terms. In the opinion of most U.S. businessmen who compete internationally, the U.S. dollar is enormously overvalued. On top of all this, placing an additional unnecessary burden of ambiguity on American enterprise results in severe economic decline.

Senator HEINZ. Thanks, Mr. Chairman.

Senator D'AMATO. Senator Proxmire.

Senator PROXMIRE. Mr. Ambassador, I think you have a chart which was prepared for us in connection with the International Monetary Fund's hearings by the Secretary of the Treasury. That chart shows that since 1977 when this act became law, the U.S. share of world trade has increased, increased rather sharply. It is falling off a little lately, because the high value of the dollar, as you just pointed out, but it is a remarkable showing here. On this index, the U.S. export volume, when the act passed, was below the world export volume, and then the index shows that we—the U.S. export volume increased and increased, sharply, much more sharply than world trade.

The overall hard, tough evidence, factual evidence, indicates that since this became law, we have done better than other trading nations have done.

Ambassador Brock. We are a better country than other countries, Senator.

Senator PROXMIRE. I agree with that. [Laughter.]

That's why we need the law. [Laughter.]

Ambassador BROCK. That is not quite sequential in its logic. I would point out to you, the surge in U.S. export volume came precisely at the time that the dollar was most undervalued. The dollar, in the mid-1970's, was substantially lower in its relationship to other countries' currency thus, having an enormous stimulative effect upon our competitive situation overseas. The dollar has reversed that role in the last couple of years.

And as you will note in your own chart, that curve has had some decline in the last couple of years.

Senator PROXMIRE. I agree wholeheartedly with that. I think undoubtedly the change in the value of the dollar was far more important than this law would be, as far as trade is concerned, although I think this law, for other reasons, is very important, but it also shows other factors such as the value of the dollar has just overwhelmed the effect of this legislation.

Ambassador BROCK. I don't disagree with that. I think the elements of the Foreign Corrupt Practices Act are simply adding to

the self-imposed problems that we have created, but I would not be so presumptuous as to say that these are the only ones. We have plenty of trade difficulties. This is only one with which we have to deal.

Senator PROXMIRE. Frankly, what troubles me about amending this Act is that, since this passage in 1977 has indicated, we have not had a repetition of the scandals of the early 1970's, would you agree that under the FCPA bribery has stopped being a significant factor in trade and, if so, aren't the benefits so large that we should not take the chance of amending the law, unless bribery raises its ugly head?

Ambassador BROCK. I would agree that bribery, by all appearances, has diminished as a consequence of the law. I do not think there is any question about that, and I think the law did have, in that sense, a beneficial effect, but I would not for a moment say that any law in this country is perfect and does not need improvement. The essential purpose of the present exercise is not to eliminate the law but to improve it.

INTERNATIONAL TREATY

Senator PROXMIRE. One more question. Former President Carter obtained a commitment by the heads of the industrial democracies that there should be an international treaty outlawing bribery. I think the chairman referred to that.

What has your administration done to achieve the promise of an international treaty outlawing bribes?

Ambassador Brock. We have attempted to pursue conversation with a number of countries. However, in all candor, there is just not a great deal of interest among the heads of state. Although some of the heads of state have changed their minds and considered an international treaty, the trade officials of most countries do not consider bribery as a danger or a threat, but rather as an advantage. In many cases, they are willing to allow bribery and, in fact, condone it. The consequence being there simply has been very little interest on any serious level concerning the subject.

Senator PROXMIRE. For the record, could you provide whatever initiatives have been taken in the last couple of years to try to achieve that?

Ambassador Brock. Yes, sir.

Senator PROXMIRE. Thank you. I appreciate that.

[The following was received for the record:]

Question. What has your Administration done to achieve the promise of an international treaty outlawing bribery?

Answer. The United States has tried to negotiate an international agreement on illicit payments since 1976. A U.N. Economic and Social Council (ECOSOC) Committee completed preparatory work in 1979 on a largely agreed draft, but the ECOSOC and the U.N. General Assembly have failed since then to take any action to conclude an agreement. This is largely due to the insistence of the developing countries on linking an illicit payments treaty with a still uncompleted code of conduct for transnational corporations. The U.S. and our major western allies have consistently opposed such linkage.

At the Venice Summit in June 1980, our government made a commitment to work in the U.N. toward an illicit payments agreement, but, if that effort faltered, to seek to conclude an agreement among the summit countries. After the General Assembly failed to reach agreement on a treaty, our representative stated that the U.S. intended to consult with other states about alternative ways to secure a treaty.

This issue was not addressed at the 1981 Ottawa Summit. Most Summit participants wanted the agenda to focus only on the most urgent problems confronting the major industrialized countries. There was also the consideration that Congress then had before it a bill to amend the Foreign Corrupt Practices Act which might have resulted in legislation strengthening our international negotiating position.

In October 1981 we asked other OECD countries if they would be interested in an agreement only among OECD members. We found no positive interest by them and even some objecting to do so. Opposition focused on the member countries' jurisprudential differences, which make achievement of such an agreement difficult. There has been little meaningful international discussion of the issue since then.

Senator D'AMATO. Senator Lautenberg.

Senator LAUTENBERG. Mr. Ambassador, is it fair to say that the increase in the strength of the dollar, having created a problem for us in exports may, in fact, reverse itself without any adjustments here, if the dollar declines as we suspect that it might?

Ambassador BROCK. Yes, of course.

Senator LAUTENBERG. Is it also fair to say that since we cannot quantify the loss of opportunity or business as a result of having the law in effect, the argument is less persuasive, in terms of the opportunity to enhance American corporate chances for more business abroad?

You will have to forgive my newness here—both of you have had considerably more experience on this side of the table than I have had—but I do have to cast a vote along the way, and I would like to do it with a degree of knowledge and understanding. It is my understanding that this bill removes two of the most effective parts of the law, the accounting standards, for one, and the jurisdiction enforceability.

Ambassador BROCK. No.

Senator CHAFEE. I would think that probably the biggest hangup in the law would be in the "reason to know" standard. That is, under the present law as it is written now, there is, if you knew or had reason to know that a bribe was being paid by an agent or somebody like that, then you are guilty, whereas, under the bill that we passed last year, which is similar to the language here, we must have authorized or directed the payment of the bribe. In other words, the line is a much clearer one. That is the principal stumbling point, I think.

Senator LAUTENBERG. Isn't it so, also, that some of the accounting practices or standards are going to be modified as a result of that?

Senator CHAFEE. That's right, and the jurisdiction of the SEC has changed to some degree in the Justice Department, but I do not think that is a principal stumbling block in connection with the act.

AMBASSADOR BROCK. Let me just add that to my understanding the accounting simplification is not a reduction in the effectiveness of the law, but an improvement.

As Senator D'Amato mentioned, a problem exists with medium and small businesses complying with the accounting provisions. By simplifying the accounting provisions, more businesses will be able to comply with the act. This produces an increase in trading activity.

JURISDICTIONAL QUESTIONS

In regard to the jurisdictional issue, one of the fundamental problems is the inconsistency and unpredictability of enforcement. Department of Justice enforces one provision of the law while SEC enforces another. Everything is disjointed and no one knows which agency to address. S. 414 eliminates this confusion because it places all antibribery enforcement responsibilities in the Department of Justice, authorizes the Department of Justice to issue clear and comprehensive guidelines as to what is or is not permissible conduct and provides that the FCPA constitutes the exclusive substantive prohibition under the U.S. Code for overseas bribery.

Presently, SEC, Justice Department, the ABA, and CPA groups all analyze the law differently. By enacting S. 414, we will prevent any more confusion about what the law says.

In addressing your interest, Senator Lautenberg, about quantifying the devastating effect on export trade, the only number I can give you comes from the Emergency Committee on Trade (ECOT), a group of business people actively involved in international trade. ECOT estimates the loss of sales on the order of \$2 billion. This translates roughly into losing 60,000 jobs. You're talking about a lot of American citizens out of jobs.

Senator LAUTENBERG. Yes. 60,000 jobs is an enormous number.

The question is whether their objective view is really objective. In this case, it is very difficult. As I think you said earlier, you cannot know what you don't know.

When we talk about small business being hurt as a result of the ambiguity: I've had some experience with business overseas in my former life, and I do not think that it is the small- and medium-sized business that has the ability to reach into the places that make a difference in terms of bribery or corruption.

It seems—and Senator Proxmire's statement earlier highlights the fact—that the worse offenses have been by the giant companies. We all know about what happened.

Ambassador BROCK. If you want to suggest to exempt small business from the original act, we would be happy to consider that alternative.

Senator LAUTENBERG. To permit one segment of the society to be corrupted and another not?

Ambassador BROCK. Your own statement is that they are incapable of being corrupted or corrupting.

Senator LAUTENBERG. I said they have little ability to.

However, again, respectfully, I acknowledge your experience and your advocacy here. I have to listen, and I do listen carefully. But I feel it is my responsibility to try to understand these things so that, again, when the day comes for casting a vote, that I cast it with a degree of intelligence.

Thank you.

Senator HEINZ. If I might just clarify something that Senator Lautenberg said, I am not sure that it is entirely accurate to say that this bill, S. 414, eliminates enforcement. What it does is it concentrates enforcement in the Justice Department.

More specifically, with regard to the bribery provisions, the Justice Department has sole jurisdiction for criminal enforcement of

both publicly and privately held companies and civil enforcement of privately held companies.

It will be given sole jurisdiction of civil enforcement of publicly held companies as well.

So, now, what happens is that any company, publicly or privately held, can go to the Justice Department to get questions answered in one place. Before, that was simply not the case.

Senator LAUTENBERG. Isn't it true, Mr. Chairman, that the Justice Department is beset by inadequacies—not enough staff to do the job that it has to do? The SEC has, I think, better skills and broader knowledge, in terms of enforcement here.

Senator HEINZ. That is a judgment each Senator has to make.

We have John Shad of the SEC, we have Jonathan Rose of the Justice Department—coming up right after this distinguished panel.

Senator PROXMIRE. Would the Senator from New Jersey yield for a moment.

I think it is a fact that the SEC did uncover much of the problem here. They are expert in this area. They have a relationship with the corporations that no other agency of Government has.

The difficulty, of course, the SEC does not want to have to enforce it. We get into that all the time up here. The Federal Reserve does not want to enforce the Truth In Lending Act. They have done it and done a good up.

But I think the chairman is correct, this would shift the enforcement entirely to the Justice Department, take it away from what the SEC has.

Ambassador BROCK. But if I might add, Mr. Chairman, with all due respect, having a number of agencies enforcing the law does not necessarily strengthen the law.

Senator PROXMIRE. It depends on the agencies you are talking about.

Ambassador BROCK. That changes from administration to administration.

Senator LAUTENBERG. I have to stay out of this, as junior as I am.

Senator D'AMATO. I think the Senator from New Jersey poses a legitimate question.

I think the appropriate witnesses in John Shad and Jonathan Rose, with respect to who has the ability, the manpower, et cetera, and what they feel the case loads might be in connection with this to pursue this further.

Mr. Ambassador, we recognize you're under deep time constraints. You have the respect and admiration of this committee. We thank you for your participation here today.

Ambassador BROCK. I thank you for your leadership on the issue and would like to reemphasize my office offers its continued assistance to you and this committee.

Thank you very much.

[Additional material received for the record follows:]

[Memorandum]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., July 26, 1982.

To: Staff of the Energy and Commerce Committee of the United States House of Representatives

From: Edward C. Schmults, Deputy Attorney General

Subject: Standard Governing Payments Through Intermediaries in the Foreign Bribery Law

I. INTRODUCTION

Before the recent Congressional recess, many of the members of the staff of the Energy and Commerce Committee were kind enough to afford representatives of the Administration an opportunity to present the Administration's views on the need for amendment of the foreign bribery law.

In the course of that meeting Deputy Assistant Attorney General Stephen Brogan stated the Justice Department's concerns over the deficiencies of the Foreign Corrupt Practices Act ("FCPA"), the most serious of which is the "reason to know" standard that currently governs payments through intermediaries. Since this subject is of considerable importance to your current review of the Act, I thought it would be useful to provide you with a written version of the views of the Department of Justice regarding the "reason to know" language.

In general, the FCPA creates liability for domestic concerns and persons associated with them on the basis of giving or offering anything of value to a person "knowing or having reason to know" that all or part of it will be used for foreign bribery. The purpose of this provision was primarily to create a means of reaching illicit payments routed through foreign agents, who received the bribe money in the form of inflated "commissions." S. 708, as passed by the Senate, would retain liability based on such payments, but would change the applicable standard. Specifically, liability would arise where a third party was directed or authorized "expressly or by a course of conduct" in furtherance of the making of an illicit payment or offer.

In the Department of Justice's estimation, the "reason to know" standard of the current law is plainly inappropriate. It is harsh and inconsistent with the general approach of modern criminal law to state of mind requirements. By contrast, the direction or authorization standard of S. 708 is an appropriate response to the problem of foreign bribery involving payments through intermediaries. In Section II of this memorandum, I will discuss the meaning of the "reason to know" standard, its relationship to the general approach to state of mind requirements in modern criminal law and its use in existing and proposed federal statutes. In Section III, I will explain why the replacement standard proposed in S. 708 is a far fairer approach to reaching the transactions that the foreign bribery law is intended to proscribe. In Section IV, I will address the significance of the use of the term "corruptly" in the current FCPA.

II. REASON TO KNOW

A. GENERALLY

The FCPA creates liability for a domestic person who makes a payment to an intermediary "knowing or having reason to know" that all or part of it will be passed along as a bribe to a foreign official. The most detailed account of the meaning of "reason to know" appears in the Restatement (Second) of Agency. The essential part of the Restatement's definition is as follows:

"A person has reason to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is a substantial chance of its existence [which is such] that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence."¹

Thus, all that "reason to know" requires is (1) a risk that a person of ordinary intelligence would perceive, where (2) disregard of that risk would involve a departure from reasonable care. In the foreign bribery context, this means that all that is necessary is the making of a payment to an agent under circumstances in which a

¹ Restatement (Second) of Agency §9, commented (1958).

person of ordinary intelligence would perceive a risk of the agent's bribing a foreign official, where the disregard of that risk would constitute simple negligence.

The inappropriateness of such a standard in a criminal statute carrying the serious felony penalties of the foreign bribery law may be seen most clearly in comparison with the state of mind requirements generally employed in modern criminal codes. Systematic statutory treatments of state of mind ("culpability") requirements in criminal codes in the United States derive from the treatment of culpability in the American Law Institute's Model Penal Code. Under the Model Penal Code's approach, only four types of culpability are recognized—intent, knowledge, recklessness, and negligence. This approach to culpability has been adopted in substance in many State criminal codes, and in particular, it is essentially followed in both the House and Senate versions of the proposed general revision of the federal criminal code.²

An underlying premise of the Model Penal Code's approach to culpability is that criminal sanctions should not be employed for minor regulatory, corrective, or remedial purposes, but should generally be restricted in their application. That premise is reflected in strict limitations on the use of negligence—even when defined as a gross deviation from reasonable care—as a basis of criminal liability. Rather, recklessness or higher degrees of culpability (knowledge or intent) are routinely required in relation to the elements of criminal offenses.³

"Reason to know" is a state of mind requirement that is more easily satisfied than criminal negligence and a fortiori more easily satisfied than recklessness. Recklessness requires awareness of a risk the disregard of which constitutes a gross departure from reasonable behavior. Criminal negligence similarly requires a risk the disregard of which is grossly unreasonable. In light of the Restatement's definition, however, all that "reason to know" requires in the foreign bribery context is a payment to an agent where a person of ordinary intelligence would perceive a risk of the agent's making an illicit payment the disregard of which would constitute simple negligence. There is no requirement that the payor actually apprehend that there is a risk of an illicit payment being made, or that the departure from reasonable care involved in the disregard of such a risk must be to any degree extreme.

Thus, the approach to state of mind requirements that has gained wide support in State criminal codes since the drafting of the Model Penal Code usually requires for criminal liability at least (1) a risk the disregard of which is grossly unreasonable and (2) conscious awareness of such a risk. Against this background, the fairness of perpetuating in the foreign bribery law a standard that requires neither awareness of risk nor gross unreasonableness is most questionable.

Under the Foreign Corrupt Practices Act, a person who engages in conduct that he has "reason to know" may result in an illicit payment to a foreign official is exposed to up to five years of imprisonment. By contrast, under current law⁴ and under both the House and Senate revisions of the criminal code, a person who engages in conduct that he has "reason to know" will result in bribery of a domestic official does not on that account commit any crime. While policies supporting a degree of circumspection in dealings with foreign agents can be identified, it is hardly apparent that their force is so compelling as to justify the severity of imposing serious felony penalties on the basis of conduct that is simply unreasonable. In terms of fairness and proportionality, the question is whether slight degrees of carelessness or imperceptiveness by domestic persons concerning the possibility of corruption by foreign agents are sufficiently reprehensible to justify imposition of the serious criminal penalties of the foreign bribery law. The Department of Justice believes the answer is no.

² See Model Penal Code § 2.02 (P.O.D. 1962); H.R. 1647 §§ 301-303 (1981); S. 1630 §§ 301.303 (1982). See generally H.R. Rep. No. 1396, 96th Cong., 2d Sess. 30-36 (1980); S. Rep. No. 307, 97th Cong., 2d Sess. 66-70 (1981). References to the "House revision" of the federal criminal code will be to H.R. 1647, 97th Cong., 1st Sess. (1981). H.R. 1647 is identical to the version of the criminal code revision voted out in 1980 by the House Judiciary Committee, H.R. 6915, 96th Cong., 2d Sess. (1980), so the Committee Report to the earlier bill, H.R. Rep. No. 1396, 96th Cong., 2d Sess. (1980), will be cited as legislative history for H.R. 1647. Another version of the criminal code revision, H.R. 4711, 97th Cong., 1st Sess. (1981), has been introduced in the House by Representative Conyers. The Conyers bill is similar in most respects to H.R. 1647, and its differences are not relevant to this discussion. References to the "Senate revision" of the federal criminal code will be to S. 1630, 97th Cong., 2d Sess. (1982). The accompanying Committee Report is S. Rep. No. 307, 97th Cong., 1st Sess. (1981).

³ See Model Penal Code § 2.02, Comment at 126-27 (Tent. Draft No. 4, 1955); S. Rept. No. 307, 96th Congress, 2d session 70 (1980).

⁴ See textual paragraph accompanying note 12 *infra*.

B. "REASON TO KNOW" IN OTHER LAWS

Some opponents of change in the FCPA have argued that "the reason to know" language appears in other statutes and therefore is appropriately used in the FCPA. However, an examination of the other provisions of federal law that currently employ "reason to know" further substantiates the inappropriateness of its use in the foreign bribery law. Aside from the anti-bribery provisions of the FCPA, there are 29 provisions in which that phrase is employed.⁵ Most of these are distinguishable in obvious ways from the foreign bribery law. Of those which are not, nearly all would be amended by the pending revision of the criminal code so as to replace the "reason to know" standard with a state of mind requirement setting a more reasonable threshold of criminal liability.

Specifically, 13 of the 29 are provisions enforceable only by civil or administrative measures, or collateral provisions that affect only civil or administrative enforcement.⁶ Obviously, use of a standard in connection with violations subject to civil or administrative remedies does not reasonably support its use in a criminal statute (the foreign bribery law) whose violation is punishable by up to five years of imprisonment.

The remaining 16 provisions fall into 3 classes:

The first class contains 6 regulatory provisions that appear outside of the criminal code (title 18 of the United States Code).⁷ Most relate to federal safety standards for certain types of products. In certain circumstances, violations of these provisions or other provisions they affect are punishable as misdemeanors. The scope, character, conditions of application and penalties of these provisions are in no way comparable to the foreign bribery law.⁸

The second class contains eight provisions in the criminal code (title 18). All of these, however, would be replaced by provisions that do not contain a "reason to know" standard with the enactment of the criminal code revision. The replacements for the "reason to know" language of these provisions are generally requirements of recklessness, knowledge, or intent.⁹

⁵ See Fedders, *The "Reason to Know" Standard—A Troublesome Ambiguity in the U.S. Foreign Corrupt Practices Act*, 4 Middle East Executive Reports 2, 20 and n. 14 (July 1981) (listing of provisions). See also R. Beckler, A. Levenson, and R. Shine, *The New Review Procedure under the foreign Corrupt Practices Act II*, at 105-08 (Harcourt Brace Jovanovich 1980) (listing and description of provisions). The 29 provisions discussed below are the 27 non-FCPA provisions listed in the Fedders article, supra, plus two recent enactments not noted in that listing.

⁶ The thirteen are: 15 U.S.C. § 714p; 15 U.S.C. § 1379(a)(1)(C); 15 U.S.C. § 1397(b)(2); 15 U.S.C. § 1692(a)(3); 15 U.S.C. § 1916(a)(4); 25 U.S.C. § 1912(a); 26 U.S.C. § 6013(e); 26 U.S.C. § 6323(i); 29 U.S.C. § 1343(a); 42 U.S.C. § 263j(a)(5); 42 U.S.C. § 1320a-7(a)(1)(A); 46 U.S.C. § 1461(b); 49 U.S.C. § 11901(i)(4)(B)(ii).

⁷ The six provisions are: 15 U.S.C. § 1916(b)(2); 15 U.S.C. § 2068(a)(6); 15 U.S.C. § 2614(2); 26 U.S.C. § 999(a); 42 U.S.C. § 5409(a)(4); 42 U.S.C. § 5409(b)(2).

⁸ For example, 15 U.S.C. § 1916(a)(1) prohibits making or importing passenger motor vehicles and passenger motor vehicle equipment that are not in conformity with federal bumper standards. A person who knowingly and willfully violates § 1916(a)(1) after having received a notice of non-compliance from the Secretary of Transportation is subject to liability for a misdemeanor under § 1917(b). An exemption from liability for violating § 1916(a)(1) is provided by § 1916(b)(2) for a person who establishes that he did not have reason to know in the exercise of due care that the vehicle or equipment was not in conformity with federal bumper standards.

⁹ For example, 18 U.S.C. § 2423(a)(2) prohibits moving a minor in interstate commerce with intent that the minor engage in prohibited sexual conduct if the person effecting the movement knows or has reason to know that the conduct will be commercially exploited. The House revision, H.R. 1647 § 2744 (1981), would replace this with a prohibition of causing a minor to engage in prohibited sexual conduct as consideration for anything of pecuniary value and of assisting a minor to participate in prohibited sexual conduct with reckless disregard for the fact that the conduct will be commercially exploited. 18 U.S.C. § 2512(1) generally prohibits manufacturing, distributing, possessing, or advertising a device, knowing or having reason to know that its design renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications. The House revision, H.R. 1647 § 2122 (1981), would substitute a prohibition of making, importing, advertising or trafficking in an eavesdropping device, knowing that its design renders it primarily useful for surreptitious interception of private communications. 18 U.S.C. § 231 prohibits teaching the use or making, or transporting or manufacturing, any firearm, explosive, or incendiary device, knowing or having reason to know or intending that it will be used unlawfully in furtherance of a civil disorder. The House revision, H.R. 1647 § 2732, would substitute a prohibition of knowingly supplying or teaching the use of a thing with reckless disregard for the fact that it is a dangerous weapon or destructive device with intent that it be used in a riot.

The eight provisions, and their counterparts in the House and Senate criminal code revisions, are as follows: (1) 18 U.S.C. § 231 (H.R. 1647 § 2732 (1981)) (S. 1630 § 1832 (1982)); (2) 18 U.S.C. § 1384 (repealed); (3) 18 U.S.C. § 2251(a) (H.R. 1647 § 2742 (1981)) (S. 1630 § 1844 (1982)); (4) 18

Continued

The third class contains two felonies that currently appear outside of the criminal code (title 18), 50 U.S.C. § 783(b) and 50 U.S.C. § 1809(a)(2). One of these would not be affected by the proposed criminal code revision.¹⁰ The other would be repealed and replaced by a provision that contains no "reason to know" language.¹¹

Thus, enactment of the proposed revision of the federal criminal code, in step with modern criminal codes generally, would leave the foreign bribery law as virtually the only felony in which liability is based on satisfaction of a "reason to know" standard.

III. THE STANDARD OF DIRECTION OR AUTHORIZATION

Section 104(b) of the proposed Business Practices and Records Act in S. 708 would replace the "reason to know" language of the current law with language creating liability when a person directs or authorizes a third party, "expressly or by a course of conduct," in furtherance of an illicit payment or offer. The "course of conduct" language was added at mark-up by the Senate Banking Committee to clarify that implicit, as well as explicit, direction or authorization would be an adequate basis for liability. It was the common understanding of the Senate staff that the pre-mark-up language of S. 708 would extend to implicit authorization. Nevertheless, the language change was made to obviate the possible, though unlikely, misunderstanding on that point.

The intended interpretation of the "course of conduct" language is simply the natural understanding of the notion of implicit direction or authorization—a person directs or authorizes an illicit payment by a "course of conduct" if his actions convey to the intermediary his intent that an illicit payment be made. It is instructive to compare this standard to that governing liability in cases of payments by intermediaries under the domestic statute governing bribery of federal officials, 18 U.S.C. § 201(b). Under that statute, no special standard is stated for cases involving bribes conveyed through intermediaries, so liability in such cases depends on a person's being liable as an accomplice of the intermediary. Under the general principles governing liability as an accomplice, it is not sufficient if a person had "reason to know" that he was promoting or assisting in the commission of an offense. Rather, in the general view of the courts, to be liable as an accomplice a person must have acted with the intent that the offense be committed.¹² Thus, the direction or authorization standard of S. 708 is akin to the standard that would be applied in comparable cases under the domestic bribery law. Setting the applicable standard at less than intent—as the "reason to know" language of the FCPA does—has the curious effect of creating liability based on illicit payments to foreign officials in cases in which no liability would result in an identical situation involving an intermediary's illicit payment to a domestic federal official.

Finally, in addition to being similar to the standard applicable in corresponding situations under the domestic bribery statute, the direction or authorization standard would not create a threshold of liability below that generally accepted as appropriate in modern criminal codes. As an intent standard it is consistent with current approaches to culpability in criminal law.

U.S.C. § 2251(b) (H.R. 1647 § 2742 (1981)) (S. 1630 § 1844 (1982)); (5) 18 U.S.C. § 2423(a)(2) (H.R. 1647 § 2744 (1981)) (S. 1630 § 1843 (1982)); (6) 18 U.S.C. § 2511(1) (H.R. 1647 § 2121 (1981)) (S. 1630 § 1521 (1982)); (7) 18 U.S.C. § 2512(1) (H.R. 1647 § 2122 (1981)) (S. 1630 § 1522 (1982)); (8) 18 U.S.C. § 2512(2)(b) (H.R. 1647 § 2123 (1981)) (S. 1630 § 1522 (1982)).

¹⁰ See H.R. 1647 § 1323(2) (1981), S. 1630 § 1123(a)(2) (1982) (incorporating 50 U.S.C. § 783(b) by reference without change).

The failure to revise this provision does not reflect approval of its current formulation, but a policy of avoiding reformulation of certain provisions whose controversial nature would impede the general revision effort. See S. Rept. No. 307, 97th Congress, 1st session 227 (1981). See also H.R. Rept. No. 1396, 96th Congress, 2d session 9, 591 (1980).

¹¹ 50 U.S.C. § 1809(a)(2) is explicitly repealed in the Senate revision. See S. 1630 at 790 (1982) (repealer); id. § 1521 (replacement eavesdropping offense). There is no repealer for 50 U.S.C. § 1809 in H.R. 1647 (1981), but this appears to be an oversight. H.R. 1647, like the Senate version of the proposed revision, contains a general eavesdropping offense addressing the subject matter of 50 U.S.C. § 1809. See H.R. 1647 § 2121 (1981). The Conyers version of the House revision, see note 2 *supra*, which is more complete on technical amendments and repealers, does contain a repealer for 50 U.S.C. § 1809. See H.R. 4711 at 463 (1981).

¹² See, e.g., *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Pearlstein*, 576 F. 2d 531, 546 (3d Cir. 1978); *United States v. Crockett*, 534 F. 2d 589, 600 (5th Cir. 1976); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (per Learned Hand, J.). See generally H.R. Rept. No. 1396, 96th Cong., 2d sess. 36-37 (1980).

IV. THE SIGNIFICANCE OF THE TERM "CORRUPTLY" IN THE FCPA

In the discussion of S. 708 with certain of the staff of the House Energy and Commerce Committee, the suggestion was made that the FCPA's use of the term "corruptly" limits liability based on an intermediary's actions to cases in which there is both an intent that an illicit payment be made—a requirement implicit in the term "corruptly"—and also provision of something of value to an intermediary with "reason to know" that he will use all or part of it to bribe a foreign official. This interpretation reflects a misreading of a portion of the House Committee Report to the FCPA, which is as follows:

"[The bill] broadly prohibits transactions that are corruptly intended to induce the recipient to use his or her influence to affect any act or decision of a foreign official, foreign government or an instrumentality of a foreign government. The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongfully to influence the recipient. It does not require that the act [b]e fully consummated or succeed in producing the desired outcome."¹³

The reference is to the provisions of the bill—now codified as 15 U.S.C. §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2)—which address straightforward payments by domestic persons to foreign officials. The passage does not purport to address the significance of the "corruptly" language in connection with liability based on payments by intermediaries under the provisions of the bill—now codified as 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3)—which contain the "reason to know" language. For example, it states that "corruptly" is used to indicate that the offer or payment "must be intended to induce the recipient to misuse his official position." This is inapposite to situations governed by the "reason to know" language, in which the recipient is not a foreign official but an agent or other intermediary. The same point applies to the corresponding statements in the Senate Committee Report.¹⁴

Title 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) create liability for one who corruptly uses an interstate instrumentality in furtherance of a payment or offer "while knowing or having reason to know" that all or part of it will be used as a bribe. In other words, what is required—if "corruptly" is understood to connote "intent"—is essentially use of an interstate instrumentality with intent to advance a payment or offer to an intermediary in circumstances providing "reason to know" that the intermediary will make an illicit payment. There is nothing in the language of the Act to support a further requirement that the domestic person intend that the intermediary make an illicit payment.

Thus, in situations governed by the "reason to know" provisions of the FCPA, a requirement of intent that an illicit payment be made by an intermediary is unsupported by the Act's legislative history and is at odds with the express language of the Act. An attorney could not responsibly advise his client that such a requirement exists under the current foreign bribery law, and a businessman could not reasonably act in reliance on such a strained construction.

As a final point, I note that this implausible interpretation, if correct, would remove any possible objection to the reform proposed by S. 708. If the foreign bribery law currently limits liability for an intermediary's actions to cases in which the principal intended that an illicit payment be made, there can be no objection to using language in the statute which makes this limitation clear.

In sum, "reason to know" is patently unsuited for use as the standard governing liability for the actions of agents and other intermediaries under the foreign bribery law. It defines a standard that sets a threshold of liability far below that generally regarded as appropriate in modern criminal law, including both the House and Senate versions of the proposed revision of the federal criminal code. It also holds domestic persons engaging in business transactions abroad to a far more exacting standard than that applicable in corresponding situations to which the domestic bribery statute applies. The FCPA's use of the term "corruptly" in no way ameliorates the deficiencies of this standard.

¹³ H. Rept. No. 640, 95th Cong., 1st sess. 7-8 (1977).

¹⁴ See S. Rept. No. 114, 95th Cong., 1st sess. 10 (1977).

By contrast, the direction or authorization standard of S. 708 does not suffer from these defects. It preserves liability for persons who act with the intent of bringing about the conduct that the foreign bribery law seeks to guard against, but does not harshly create liability for a serious felony offense on the basis of slight degrees of culpability.

For these reasons, the Department of Justice believes that the reform contemplated by S. 708 is not only beneficial but also plainly warranted. The Department accordingly urges the Committee to take action on this legislation. I hope this memorandum will be useful in your efforts to correct the deficiencies of the current Act. If you have any questions on this memorandum, I would be happy to provide additional information.

TESTIMONY OF JOHN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator D'AMATO. We certainly thank you for being so patient and understanding.

Senator CHAFEE. Thank you, Mr. Chairman.

I would like to commend you and Senator Heinz for holding these joint hearings today. And I appreciate the attendance of those of you who are here, because this is an issue that I believe is extremely important, and I appreciate having the opportunity to testify today.

The hearings on the Business Accounting and Foreign Trade Simplification Act, S. 414, which is identical to the version we passed in the Senate in—1981, I guess it was, by a voice vote.

I would like to say it was unanimous, but we did not test the waters. At least it got through on a voice vote.

As you have mentioned, Mr. Chairman, I have been interested in this proposal, changes in this legislation for the past 3 years. And I think, as Ambassador Brock has mentioned, it is an extremely important piece of legislation to help in maintaining our strength in the world export market.

Over the past decade, as this committee knows, our economy has become increasingly dependent upon export trade. And the figures really are startling.

During the 1970's, U.S. exports doubled in proportion to the size of our national economy.

This statistic that I give you next is one of the most astonishing to me. From 1977 until the recession came in late 1981, four out of every five new manufacturing jobs—true manufacturing jobs, I am talking about, not service, but manufacturing—four out of five, every five new manufacturing jobs created in this country were generated by the export sector of our economy.

And in the service industries, insurance, banking, telecommunications, hotels, engineering, and so forth, our exports also grew. And we led the world in foreign contracts as the chart indicated that Senator Proxmire distributed.

So, exports have been a source of prosperity.

Of course, competition has become ever-increasingly severe. And there are various problems as to why, as indicated on the chart that Senator Proxmire distributed, our total share of trade, proportionately, has declined. Some is obviously the high value of the dollar. Some is perhaps unfair competition from abroad. Some of it is U.S. excessive demands by labor. Some is industry complacency.

But it seems to me that what we should be doing is looking at it from the point of view of what can we, as the Congress of the United States, do to help in this situation?

It may be that we can do something about the high value of the dollar without causing commensurate damages elsewhere.

CHANGES IN LAW TO REMOVE EXPORT DISINCENTIVES

But here, in the Foreign Corrupt Practices Act, I believe that there are changes that can be made to remove the disincentives on our exports.

Now, I know there are two questions that are constantly raised. One is: "You are permitting bribery?"

The answer to that is we are not repealing the law. This is not a repeal of the law that Senator Proxmire mentioned, passed unanimously in 1977 and which I voted for, as did Senator Heinz and others who were in the Senate at that time.

Second, it is not a cureall. We admit that. But at least it is a step forward. It is something we can do.

Now, in answer to the question that is always raised, "Quantify. Name me someplace where a job, a contract has been lost overseas"—as Senator Lautenberg mentioned, it is extremely difficult to say we did not get the job because we did not go there.

But as those who listened to the testimony that we had last year and the year before, it was clear from those witnesses that came that they had lost contracts.

How much the contracts were, how many jobs were lost, they were not able to exactly pinpoint.

But when we have two administrations, one Democratic and one Republican, each having labeled the act a major impediment to increasing our exports and have sought its correction—you know, this was started under President Carter's regime.

We have had an outstanding Democratic leader in the Senate, who then became an ambassador—no one would challenge his integrity or veracity—Mike Mansfield. Ambassador Mike Mansfield had spoken on the need to make the corrections in this act.

We have heard from Ambassador William Brock on the subject. It seems to me that instead of saying that we won't do anything because you cannot prove it to us, I think we ought to take the other look at it and say these people obviously know something. The witnesses that we have had before us have testified to that.

So, let's do what we can, without in any way gutting the act.

I think the compromise that passed here in 1981 was a good one.

I recall, as far as the accounting provisions—Senator Proxmire himself said that, as far as the accounting provisions, the bill that then was, I believe, S. 708 was actually strengthened.

Now, you can check that statement from the Congressional Record, but that is the statement, as I recall it.

So, Mr. Chairman, I would hope that we could get on with this.

As you know, there is an elaborate dialog with the House last year, in 1982, particularly the subcommittee of—the Telecommunications Subcommittee chaired by Representative Wirth on how we might get the act passed in the House.

Some of the suggestions there that came from that dialog I think were helpful. And possibly they could be incorporated in the legislation that you finally bring out here or, as Senator Heinz suggested, could be worked out in conference.

But the way I look at it, Mr. Chairman, is let's do everything we can to help jobs in the United States without in any way gutting the act. But let's get on with removing this, which so many witnesses and those in Government, from both administrations, from all of the different branches, have labeled a very serious impediment to U.S. exports.

So, Mr. Chairman, were I sitting where you are—if I were sitting where you are, I would be working extremely hard, as I did in the past years, for the passage of this act. But I am not there anymore. But where I am, be it—as just a Member of the Senate or in the Finance Committee, in whatever capacity I can be of assistance for the passage of this act, I certainly would do everything I can.

And I appreciate your forbearance while I gave my statement.

Senator D'AMATO. Thank you, not only for your testimony but for your continued support, the eloquence and the logic of your presentation.

This is not an attempt to gut the Foreign Corrupt Practices Act. I think it is an attempt to make it more workable.

And I do believe that last year, with the help not only in terms of your leadership, but also with Senator Proxmire's compromise, that we forged, I think, a workable bill, one that makes sense. And hopefully we can pass it quickly. The House will pass a version, and we can iron out the differences and make, I think, the overriding consideration one of, yes, we are not going to condone bribery. No one here does that. But we also don't want to create more difficult unnecessarily and impede the flow of commerce and exports and make it more difficult for all businesses, small and large.

And we thank you for your continued effort and dedication in this area.

Senator HEINZ. Indeed, last year the committee did receive testimony on examples of lost trade as well as increased costs from the Foreign Corrupt Practices Act. We have examples cited in our report which we had printed October 9, 1981, citing specific examples in the following countries: Brazil, Mexico, Venezuela, Liberia, United Arab Emirates, Qatar, China, Thailand, Philippines, Indonesia, South Korea, Taiwan, Saudi Arabia, Cameroon, to name a few countries, with specific examples.

So I would only add to what Senator Chafee says, that these are difficult to quantify, but we have some, and maybe you cannot extrapolate from all of these examples, the amount in terms of billions or hundreds of millions of dollars that are involved, but it appears to be quite significant, it appears to be quite real.

I hope our colleagues will bear in mind that while "a single swallow does not a summer make," we have quite a few swallows around in this case, and I think they support the point of view presented by the Senator from Rhode Island.

Senator CHAFEE. Thank you, Mr. Chairman.

SMALL BUSINESSES LIKELY TO SUFFER

In reponse to a point raised by Senator Lautenberg dealing with small business, as you recall, the testimony we had on that last year, that the small businesses are far more at the mercy of agents than are the large businesses that can send their own people out there, whom they have a tight string on, whom they know exactly what they're going to do, whereas the small business is dependent upon a commission agent or whatever it might be, and if the agent goes sour, the small businessman is likely to go to jail because the statement is that he had reason to know that this person would have indulged in a bribe, whereas a small businessman does not have the opportunity to check out every agent as a large business does.

Senator PROXMIRE. I want to commend you on your willingness to compromise on this and the good hard work you did, and I do think you did improve your bill greatly. You deserve a lot of credit for that.

I would like to ask your reaction to the statement by Mr. Shine, who served as Chief of the Multinational Fraud, Criminal Division of the Department of Justice, until April of 1977 until September of 1982. In that capacity he was responsible for justice and enforcement of the Foreign Corrupt Practices Act. This is what he said, in part. This is an article that appeared February 21, 3 or 4 days ago in the Washington Legal Times:

The problems with the definition of the facilitating payment exemption in S. 708 were increased significantly by the amendment to the definition that was made and passed on the floor of the Senate. The last part of the definition was deleted, so the definition of the exemption in S. 708, as passed by the Senate, reads as follows: '1. Any facilitating or expediting payment to a foreign official, the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official.'

Mr. Shine says:

As a consequence of the floor amendment, payments in an unlimited amount could be made to senior level foreign officials in return for either a discretionary or nondiscretionary act. The only statutory limitation would appear to be that the official's act must be a routine one. One may anticipate endless discussions about whether a particular governmental action is actually routine. For example, foreign officials' daily activity involve the awarding of contracts with a payment to him in return for the award of the contract constitute a lawful payment to secure the performance of routine governmental action. Such a definition could serve only to increase ambiguity and unpredictability.

This is a man who probably had the best experience in enforcing the act for 5 years up until last September. This is his present criticism.

What is your response?

Senator CHAFEE. As you know, we had discussion on that matter, and I will not die in the barricades over the exact language there. We took "routine" to mean a nondiscretionary action on behalf of some local official, but if you can come up with a clearer definition, that is fine by me. All I want to do is, to the extent possible, make it clear exactly what can and cannot be done, and that, as you recall, if you look further in that section, I think you will find a clearer definition of what were expediting payments in that particular section.

Senator PROXMIRE. I either want to leave it the way it is or make sure we did not leave the kind of loophole that Mr. Shine has pointed out.

Senator CHAFEE. Mr. Rose will be here testifying, and you can obviously draw out his views on that.

What I am trying to do is get it as clear as possible what people can and cannot do, and that is why, as you know, we went in the bill we passed, which was one of the major changes, to change the "reason to know" to "authorize or direct," which I think was clearer to the exporter, the U.S. exporter.

Senator PROXMIRE. Thank you very much.

Senator D'AMATO. Senator Lautenberg.

Senator LAUTENBERG. Senator Chafee, I appreciate the comment that you made about the small businessman is in a different position.

Do we know whether the reason to know penalty or attribution has ever been applied in terms of the small—the person using an agent to conduct their business overseas? Is that something that has been under scrutiny. I ask you this—

Senator CHAFEE. The problem has been, as the term used so frequently, "the chilling effect," the penalties under this law, as you know, are extremely severe, and they go right to the president of the company, that is the exporting company. He can go to jail, even though we have testimony from the Justice Department and from the SEC, as well, that they, that they were not going to throw somebody in jail for what was viewed as an honest mistake. Nonetheless, that is not the way the law reads, especially when you're looking at the situation with 20-20 hindsight. He deals with an agent. The agent seems all right, but later appears to have been a real scoundrel and, as you dig into it more and more, it turns out that really, "Why didn't you know he was a scoundrel?"

Looking at it retroactively, it is a very, very tough penalty. So the witnesses that we had said that they just plain weren't going to take the risk in going into countries. "It's fraught with problems, and forget it."

Actually, we did have very good testimony about a man who specifically got into one of those situations and had to cancel it all, with a very handsome order, because the suggestion that it might be tainted in some way with bribery came up.

Senator LAUTENBERG. I'm embarrassed to ask any further questions. I feel like the student asking the professor, Senator Chafee.

Senator CHAFEE. You probably know as much about exports as all of the rest of us put together.

Senator LAUTENBERG. May I say this though in my defense, I really do not understand the Foreign Corrupt Practices business, because we did not have to engage in it when I was in business. [Laughter.]

Senator CHAFEE. I would not want you to have the opinion who is here for changes is supporting it because they've burnt by the act. [Laughter.]

Senator D'AMATO. Thank you so very much for coming and giving us your expertise and your continued leadership.

I think particularly it is worthy to note that no one is saying that it has to be this exact language. They are saying let's deal

with the basic overall problem. If there is a better way to deal with the specific problem as you have indicated there may be, then we should implement those changes which will make it easier for the business person to understand. Because of the uncertainty in the current law many businesses have avoided international transactions for fear of being subjected to a testimony from numerous witnesses last year that they were criminal prosecution. We have heard a great deal of testimony supporting this.

So we thank you for your leadership in this area.

Senator CHAFEE. I would like to thank you and all the members of the committee for taking this up. I suspect this is the first measure you have moved forward with in a substantial way, and I think that is wonderful, and I would like to express my thanks. I will do anything I can to be of help.

Senator D'AMATO. Thank you.

Senator HEINZ. Thank you.

Senator D'AMATO. Let's call our next panel, this will include the Under Secretary of the Department of Commerce, Lionel Olmer as well as Mr. Jonathan Rose, Assistant Attorney General for Legal Policy and the Honorable John Shad, Chairman of the Securities and Exchange Commission.

STATEMENTS OF LIONEL OLMER, UNDER SECRETARY, DEPARTMENT OF COMMERCE; JONATHAN ROSE, ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY; AND JOHN SHAD, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

Mr. OLMER. Thank you, Mr. Chairman.

I have a prepared statement that I would like to have entered into the record, subject to your approval, and I have no elaboration of that testimony to make, except to endorse, on behalf of Secretary Baldrige, our complete support for the statement offered by Ambassador Brock.

Nothing has changed to alter our view that the passage of amendments to the FCPA is vital. It grows more important as our competitive posture in Third World markets, in particular, grows more tenuous. I would perhaps point out that embodied in the record of consideration of the act last year is a reference to a number of studies which document example after example. Those include the Governors' Association, the President's Export Council, the General Accounting Office, each of which has taken a great deal of effort to explain in massive detail why changes are desirable and what effect it is estimated they have had on business.

In the intervening months, I have taken several trips to our foreign embassies, have had conversations with our foreign commercial officers, and can testify that there is a continued affirmation of the need for modification to the act by those officers based on their contact with members of the U.S. exporting community. Two trade and investment missions which Secretary Baldrige has also brought us into rather intense contact with American exporters over about a 10-day period, in which you travel and conduct business meetings with them.

During these missions we had another fair opportunity to explore from the point of view of people on the firing line, what their

views were on the relative importance of this act to their competitive position. And again, I say, and underscore it, that there is nothing that has altered our view of the vital need to change the act as it is written, and we do support the legislation.

[The complete statement follows:]

STATEMENT OF LIONEL OLMER, UNDER SECRETARY FOR INTERNATIONAL TRADE

INTRODUCTION

I am happy to be here to discuss legislation to amend the FCPA. The Administration supports S. 414 which is a constructive effort to address and resolve difficulties in interpreting and complying with the present Act.

Let me say at the outset, the Administration supports the purpose of the FCPA. Bribery and corruption in international business transactions is inherently wrong and we oppose it. In advocating revision of the FCPA we are merely recognizing that this Act is now over five years old, and we now have enough experience with it to see that some changes are necessary in order for the Act to serve its intended purpose.

In its present form the FCPA acts as a significant export disincentive. Uncertainty over how to comply with the present act has inhibited otherwise legitimate business transactions. Some corporate managers, worried about the threat of adverse publicity that can result from even suggestions of non-compliance, have chosen to stay out of major markets to avoid even the slightest risk of allegations of wrongdoing.

We can make the FCPA clearer and in doing so can improve significantly our export trade.

We have identified three major problems with the current law. The law can impose criminal liability on corporations who merely have "reason to know" that a third party, such as an agent, is going to bribe a foreign official with money received from the corporation. The law also contains burdensome and costly accounting provisions. Finally, the law is not clear on what types of payments are permissible under the Act. I shall deal with each of these in turn.

"REASON TO KNOW" STANDARD

The vagueness and ambiguity over when "reason to know" exists has deterred business from involvement in otherwise lucrative overseas opportunities because of a fear that they would be charged with an FCPA violation.

Several governmental studies have documented this deterrence, including the September, 1980 Report of the President on Export Promotion Functions and Potential Export Disincentives; the December, 1980 Report of the President's Export Council; and the March, 1981 GAO report on the FCPA.

The "reason to know" standard is particularly troublesome for a corporation that hires an agent who then without authorization bribes officials. In that case, a corporation can be found liable by a court in hindsight making a subjective judgment that a company should have known of the agent's conduct.

For example, a Latin American company decided against expanding its export market because of the "reason to know" standard after spending over \$250,000 in marketing studies.

In our judgment the purposes of the FCPA can be met without interjecting such a vague and ambiguous standard. We believe the approach taken by the Senate in S. 414, where liability under the Act comes from payments "directed or authorized" by a corporation, is an appropriate solution.

The "direct or authorize" standard serves clear notice that corporations will not be able to order bribery of foreign officials but also protects companies from prosecution for activities that they were not involved with in any way.

ACCOUNTING PROVISIONS

When the Administration testified on amending the FCPA in the 97th Congress we advocated repeal of the accounting provisions. In their place we proposed criminalizing the falsification or concealment of payments prohibited by the FCPA in all business records. The Department still believes that proposal has substantial merit. However, we recognize that the Senate failed to adopt this proposal last year, and we are satisfied with the bipartisan approach to the accounting provisions in S. 414.

The accounting provisions in S. 414 require issuers to "devise and maintain a system of internal accounting controls to provide reasonable assurances" that: (1) transactions are authorized and recorded to maintain accountability; (2) access to assets is permitted only in accord with management standards; and (3) recorded assets are compared regularly with existing assets and appropriate action taken if differences exist.

In particular, there are several areas of S. 414's accounting provisions that have our strong support. These include:

The decriminalization of the accounting provisions except for knowing circumventions of existing accounting systems.

The establishment of a "good faith" defense to civil actions brought under the accounting provisions.

The statutory definition of what constitutes "reasonable assurances" in establishing an internal accounting system; and,

The establishment of a cost/benefit test in determining whether a particular accounting practice or policy need be undertaken to provide the required "reasonable assurances."

DEFINING PERMISSIBLE PAYMENTS

Certain facilitating payments are permissible under the Act if made to ensure the performance of duties which "are essentially ministerial or clerical."

In practice, this term has sometimes proven difficult to interpret, and business opportunities have been lost as a result.

In our judgment, S. 414 is a useful starting point for that analysis as it removes the "ministerial/clerical" test and substitutes the test of allowing "payments for routine government actions." Additionally, Section 104(c) of S. 414 specifically enumerates narrow categories of exempted payments including: (1) payments that are legal under the law of a foreign official's country; (2) tokens of esteem; (3) expenditures associated with the selling or demonstration of goods and services; and (4) ordinary expenditures associated with the performance of a contract.

By having such specific exemptions the business community can be more certain that certain types of payment will not subject them to liability and thereby be more willing to export overseas.

ALTERNATIVES TO S. 414

Senator Chafee made an excellent effort last session to negotiate a compromise with the House on similar amendments to the FCPA. While the Administration supports S. 414, as written, we would be willing to consider the proposals put forth by Senator Chafee if the Committee feels that such consideration would strengthen the bill and its ultimate passage by the Congress.

CONCLUSION

Mr. Chairman, I appreciate the opportunity to express my views today, and I would welcome the chance to work with the Committee in the future as it considers S. 414. I would be happy to answer any questions the Committee has.

Senator D'AMATO. Chairman Shad.

TESTIMONY OF JOHN SHAD, CHAIRMAN, SECURITIES AND EXCHANGES COMMISSION

Mr. SHAD. The SEC has submitted a formal statement for the record. And I would like to make a brief opening statement, which I believe is responsive to some of the references to the Commission earlier and also does summarize the Commission's views on some of the critical issues that are posed.

Chairmen D'Amato and Heinz and members of the subcommittees, the Securities and Exchange Commission appreciates this opportunity to support S. 414. It is consistent with the Commission's 1981 testimony on S. 708 and would eliminate ambiguities while preserving the objectives of the Foreign Corrupt Practices Act.

The FCPA accounting provisions have spawned great uncertainty. S. 414 would incorporate the recordkeeping requirements within

the objectives of the internal accounting controls provisions and would continue to hold management responsible for providing reasonable assurances that corporate transactions are recorded accurately and in reasonable detail.

Auditing Standard No. 1 requires that transactions be recorded in the amounts and accounting periods in which they are executed and that they be appropriately classified. S. 414 would also prohibit the knowing circumvention of accounting controls, including deliberate falsification of books and records. It would clarify the requirement that issuers provide reasonable assurances that the statutory objectives of their internal accounting controls are met. Such assurances would be deemed reasonable if they would satisfy prudent individuals in the conduct of their own affairs on a cost-effective basis.

FCPA COMPLAINTS COSTS GREATER THAN BENEFITS

In 1981, 56 percent of the 185 companies that responded to the GAO survey stated that FCPA compliance costs were greater than the benefits.

S. 414 would reduce excessive compliance costs by making it clear that no criminal liability will result solely from failure to comply with the accounting control requirements.

The following provisions are also consistent with the Commission's 1981 testimony. No civil injunction would be imposed if an issuer could show a good faith effort to comply with the accounting controls requirement.

Persons other than an issuer would not be held responsible unless they knowingly caused an issuer to fail to devise or maintain an adequate system of accounting controls or knowingly circumvent such a system.

Issuers would be subject to a good faith test if they failed to cause subsidiaries in which they held 50 percent or less of the voting power to comply with the accounting controls requirement.

The Commission has brought 24 enforcement actions under the accounting provisions of the Foreign Corrupt Practices Act, 21 injunctive actions and 3 administrative proceedings.

Two-thirds of these actions have been brought during the past year and a half. All of these actions have been uncovered in connection with inquiries into other possible violations of the securities laws.

To date there has been no judicial clarification of the accounting provisions. The defendants or respondents in 20 of the cases have consented to the entry of injunctions against future violations or other relief without admitting or denying the Commission's allegations. The remaining four cases are still pending.

The Commission may clear prior to enactment of the Foreign Corrupt Practices Act that the prohibition of foreign bribery raises national policy issues unrelated to the objectives of the securities laws.

ANTIBRIBERY RESPONSIBILITIES

However, Congress decided to assign certain antibribery civil enforcement responsibilities to the Commission and other civil and

criminal antibribery enforcement responsibilities to the Justice Department.

The Commission's antibribery enforcement responsibility as set forth in section 30A of the Securities Exchange Act. The two enforcement actions that have been brought under this provision also include antifraud and disclosure allegations and could have been brought without reference to section 30A.

The Commission's primary mission is disclosure, not substantive regulation of commercial transactions. Therefore, repeal of section 30A or consolidation of that requirement within the Justice Department would not impair the SEC's ability to administer the securities laws.

If foreign bribery involves the failure to disclose material information to investors, the Commission would retain the full authority to take appropriate action.

For these reasons the Commission does not oppose consolidation of the antibribery enforcement responsibilities within the Justice Department. Therefore, as in our testimony in 1981, the Commission defers to the Justice Department with request to questions concerning the antibribery amendments.

While the legislative process may result in further refinements, S. 414 would clarify the law, eliminate ambiguities and reduce uncertainties.

For these and the foregoing reasons, the SEC supports S. 414.

Thank you.

[The complete statement follows:]

PREPARED STATEMENT OF HON. JOHN S. R. SHAD, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

I. INTRODUCTION

The Securities and Exchange Commission appreciates the opportunity to participate in these hearings concerning S. 414, the Business Accounting and Foreign Trade Simplification Act. The Commission supports the objectives of that legislation, the simplification and clarification of the Foreign Corrupt Practices Act of 1977 ("FCPA"). S. 414 is consistent with the aims articulated by the Commission in its 1981 testimony on a predecessor bill, S. 708.¹ Like that bill, S. 414 would eliminate ambiguities and simplify the administration of the FCPA while preserving the objectives that the Commission and the Congress sought to achieve when the law was enacted in 1977. For these reasons, we support the bill.

As the Commission's 1981 testimony indicated, "the Foreign Corrupt Practices Act has generated a substantial degree of consternation among business men of utmost good faith."² Most of the concerns expressed to the Commission have arisen from difficulty in interpreting the reach of the accounting provisions of the Act. This lack of certainty exists on the part of independent accountants, financial executives, the securities bar and members of the Commission's staff.

II. THE ACCOUNTING PROVISIONS

In response to such concerns, the Commission supported legislation in the last Congress which would have clarified the FCPA and eliminated ambiguities. In addition, it has provided guidance concerning its interpretation of the accounting provi-

¹ See Statement of the Honorable John S. R. Shad, Chairman, Securities and Exchange Commission, before Joint Hearings of the Subcommittee on Securities and the Subcommittee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs Concerning S. 708 (June 16, 1981). [Hereinafter "1981 Testimony"]

² 1981 Testimony at 5.

sions³ and supported the Justice Department's efforts to afford guidance concerning the bribery prohibitions.⁴

Moreover, as will be shown in greater detail below, it does not appear that the Commission needs the tool of the FCPA to implement its traditional responsibilities for enforcing the disclosure and antifraud provisions of the securities laws. Since enactment of the FCPA, the Commission has brought 21 injunctive actions in which it has alleged violations of the FCPA's accounting provisions. However, all these actions also cited other sections of the Exchange Act, and all could have been brought and sustained without reference to Section 13(b)(2) (which was added by the FCPA).⁵ The Commission could not proceed directly against inaccurate books and records or inadequate corporate controls without the accounting provisions of the FCPA, and cases could arise in which no material nondisclosure is alleged and where these provisions would provide the only basis for an enforcement action. Nevertheless, with or without the accounting provisions of the FCPA the Commission retains the ability to discharge its traditional responsibilities of enforcing full disclosure of material information to the investing public.⁶

A. The purposes of the accounting provisions

The accounting provisions of the Act, which are contained in Section 13(b)(2) of the Securities Exchange Act, require issuers: (a) "to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;" and (b) "to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that * * *" certain statutory objectives are met.⁷

B. Accounting provision amendments

Amendments to the accounting provisions should accomplish two goals in addition to ensuring that the statutory objectives of the FCPA are met. First, they should provide greater certainty in order that persons subject to the Act know what it permits and what it prohibits. Second, amendments should reduce compliance requirements that are not necessary to the accomplishment of the statutory objectives. These goals remain the appropriate ones in any efforts to amend the FCPA. The Commission recognizes that there may be a variety of ways to achieve them. Its analysis of S. 414 indicates that this bill does address all of the relevant concerns while still preserving the principal objectives of the FCPA.

1. Achievement of greater certainty.—Meaningful and cost-effective compliance requires that the law be understandable and unambiguous. The law should reduce uncertainty, not compound it.

S. 414 would eliminate the existing requirement that reporting companies "make and keep records which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." That recordkeeping requirement has been one of the greatest sources of ambiguity and interpretive difficulty in the statute. The elimination of this requirement, however, would not sacrifice the goals underlying the FCPA.

³ Securities Exchange Act Release No. 17500 (Jan. 29, 1981), 46 F.R. 11544 (Feb. 9, 1981), 21 SEC Docket 1466 (Feb. 10, 1981) (hereinafter "the Commission's 1981 Policy Statement"). See also Securities Exchange Act Release No. 15570 (Feb. 15, 1979), 44 F.R. 10964 (Feb. 23, 1979), 16 SEC Docket 1143 (Mar. 6, 1979); Securities Exchange Act Release No. 15772 (Apr. 30, 1979), 44 F.R. 26702 (May 4, 1979), 17 SEC Docket 421 (May 15, 1979); Securities Exchange Act Release No. 16877 (June 6, 1980), 45 F.R. 10134 (June 13, 1980), 20 SEC Docket 310 (June 24, 1980).

⁴ Securities Exchange Act Release No. 17099 (Aug. 28, 1980), 45 F.R. 59001 (Sept. 5, 1980), 20 SEC Docket 1258 (Sept. 16, 1980).

⁵ The Commission has, however, brought two administrative proceedings alleging only violations of the accounting provisions. See footnote 13 *infra*.

⁶ The Commission has adopted two rules, Rule 13b2-1 and 13b2-2, following enactment of the FCPA. Rule 13b2-1 prohibits any person from falsifying corporate records and Rule 13b2-2 prohibits corporate officers, directors and shareholders from misleading auditors. We believe that the enactment of S. 414 would not affect the validity of these rules. The Commission would, revise its Rule 13b2-1 interpretive position to include a knowledge requirement.

⁷ These objectives are reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criterion applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

The legislative history of the FCPA shows that the books and records provisions and the internal controls provision were intended to be coordinate. S. 414 would continue to hold management responsible for providing reasonable assurances that corporate transactions are recorded accurately and in reasonable detail.

As Statement on Auditing Standards No. 1 reflects, "The objective of accounting control with respect to the recording of transactions requires that they be recorded at the amounts and in the accounting periods in which they were executed and be classified in appropriate accounts."⁸ Moreover, the Senate bill would prohibit the knowing circumvention of a system of internal accounting controls. This would include the deliberate falsification of books and records or other conduct calculated to evade the internal accounting controls requirement.

Thus, S. 414 effectively addresses the difficult problem of statutory ambiguity and preserves the goals of the statute.

In a further step in the direction of certainty, S. 414 adopts the Commission's 1981 recommendation that "reasonable assurances" be defined as those that would "satisfy prudent individuals in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits."⁹

The cost-benefit test is presently contained in the legislative history of the Act, but is not set forth in the statute. The test is consistent with the auditing standard which recognizes that "the cost of internal control should not exceed the benefits expected to be derived."¹⁰ The auditing standard also recognizes that "[t]he benefits consist of reductions in the risk of failing to achieve the objectives implicit in the definition of accounting control."¹¹

The prudent person standard is new. It would provide a benchmark for assessing the reasonableness of management judgments concerning systems of internal accounting controls.

2. Reduction of compliance costs.—The proposed legislation would reduce undue compliance costs by making clear, in the language of the statute, that no criminal liability will result solely from failure to comply with the accounting provisions. If a violation of the internal accounting controls requirement should be associated with criminal violations of other provisions of the securities laws, a criminal prosecution could be brought on the basis of those other provisions.

The bill would also make clear that no civil injunctive relief may be imposed with respect to an issuer for failing to comply with the accounting provisions "if it can show that it acted in good faith in attempting to comply with the internal accounting controls requirements." This is consistent with the Commission's 1981 testimony, which made clear the Commission's view that it is inappropriate to hold a corporation liable for recordkeeping or internal accounting controls violations by low or middle level employees, in the absence of involvement by senior officials.¹²

Persons other than an issuer would only be subject to civil injunctions if they knowingly cause an issuer to fail to devise or maintain an adequate system of internal accounting controls or knowingly circumvent such a system. While this amendment has no counterpart in the present law, it is also consistent with the Commission's 1981 testimony.

The proposed legislation would also clarify the extent to which issuers may be held responsible when they hold 50 percent or less of the voting power of a subsidiary. The bill would require that an issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such a firm to comply with the internal accounting controls requirement. This provision is also consistent with the Commission's 1981 testimony, which proposed that the 50 percent or less standard refer to voting power, instead of equity capital (as originally proposed in S. 708).

C. The Commission's enforcement of the accounting provisions

The Commission has brought 24 enforcement actions under the accounting provisions since the FCPA was enacted in 1977, including 21 injunctive actions and 3 administrative proceedings. Sixteen of these actions, or two-thirds, have been brought during the past year and one-half.

Violations of the accounting provisions have all been uncovered in connection with inquiries into other possible violations of the securities laws. Each of the in-

⁸ Section 320.38.

⁹ 1981 Testimony at 10-12.

¹⁰ Statement on Auditing Standard No. 1, Section 320.32.

¹¹ *Id.*

¹² 1981 Testimony at 15-18.

junctive actions has involved allegations that the corporate defendant violated one or more disclosure requirements of the federal securities laws. These include the antifraud provisions contained in Sections 10(b) of the Securities Exchange Act, the reporting requirements set forth in Section 13(a), and the proxy provisions contained in Section 14(a) of the Act, and applicable rules. Thus, each of these injunctive actions could have been prosecuted without reference to the FCPA accounting provisions. Two of the three administrative proceedings were based solely upon the accounting provisions, but these cases were settled on that basis in light of the particular circumstances of the case.¹³

To date, there have been no judicial interpretations to clarify the accounting provisions. The defendants or respondents in the 24 cases that have been settled have consented to the entry of permanent injunctions against future violative conduct or other relief without admitting or denying the Commission's allegations. The remaining 4 cases are pending.

The cases brought to enforce the accounting provisions have involved improper accounting with respect to four broad categories of conduct: (a) questionable or illegal payments; (b) exaggeration of company sales and assets, or the failure to keep adequate records of business transactions; (c) misappropriation or diversion of corporate assets in cases that have not involved questionable or illegal payments; and (d) unauthorized management perquisites.

III. THE ANTIBRIBERY PROVISIONS

The FCPA also charges the Commission with responsibility for civil enforcement of the prohibition against the bribery of foreign government officials by issuers. This prohibition contained in Section 30A of the Securities Exchange Act was added by the FCPA. It has been a less important part of the Commission's enforcement authority. To date, the Commission has brought two enforcement actions under this provision.¹⁴ Each of these cases also included allegations of antifraud and disclosure violations and thus could have been maintained under the federal securities laws without reliance on Section 30A.

The Commission's mandate is to protect investors through full disclosure. The Commission made it clear, prior to enactment of the FCPA, that the prohibition of foreign bribery raised important issues or national policy unrelated to the objectives of the securities laws. Former Commission Chairman Hills recommended to the Senate Banking Committee that, if Congress chose to outlaw such transactions, it should not do so under the securities laws.¹⁵ Congress decided, however, to assign responsibility for civil enforcement of the prohibitions applicable to issuers to the Commission, and assigned criminal enforcement to the Justice Department.

Because of the Commission's primary mission is disclosure, not substantive regulation of day-to-day commercial transactions, repeal of Section 30A would not impair the Commission's ability to administer the securities laws. In instances where foreign bribery involves a failure to disclose information which is material to investors, the Commission would retain its authority to take appropriate action. For these reasons, the Commission would not oppose the proposed amendment which would transfer all enforcement authority with respect to Section 30A to the Department of Justice. In addition, consistent with its 1981 testimony, the Commission defers to the Department of Justice with respect to the substance of the proposed amendments to the antibribery provisions.

IV. CONCLUSION

While the legislative process may result in further refinements of the proposed legislation, the bill as introduced is a constructive and responsible measure. The enactment of S. 414 would clarify the law, eliminate ambiguities and reduce uncertainties. For the reasons stated, the Commission is pleased to support the bill.

¹³ In the Matter of Telex Corporation (Admin. Proceeding File No. 3-6123, Securities Exchange Act Release No. 18694, commenced Apr. 29, 1982); In the Matter of Government Securities Management Company, Inc. (Admin. Proceeding File No. 3-6153, Investment Advisers Act Release No. 814, commenced July 21, 1982).

¹⁴ *SEC v. Katy Industries, et al.* (N.D. Ill., Civil Action No. 78C-3476, commenced Aug. 30, 1978); *SEC v. Sam P. Wallace, Inc., et al.* (D.D.C., Civil Action No. 81-1915, commenced Aug. 13, 1981).

¹⁵ Testimony of Roderick M. Hills, Chairman, Securities and Exchange Commission, before the Senate Committee on Banking, Housing, and Urban Affairs, P. 9 (Mar. 16, 1977).

Senator D'AMATO. Chairman Shad, last year during our hearings, you testified to the following question when asked—and I will repeat for you that question: "Is there a need to deal with the Foreign Corrupt Practices Act to make it more effective as a tool against bribery and yet not become a retardant to the conduct of legitimate business?"

Your reply was at that time, "I believe so, yes."

Do you still hold to that belief in that statement?

Mr. SHAD. Yes.

Senator D'AMATO. Would you care to expand upon that at all? [Laughter.]

Mr. SHAD. Did I say anything further in the first testimony? [Laughter.]

On the bribery portion, I would prefer not to respond because the Commission defers to the Justice Department. The Commission does not object to the proposal to consolidate enforcement authority.

As to the accounting provisions, I believe the greatest area of uncertainty in the Act has been the books and records section, which concerns the responsibility for maintaining accurate books and records. It has caused companies great consternation.

When you get into these areas of uncertainty, the tendencies of both the lawyers and the accountants is to be conservative in their advice. They tell their client, you'd better do it. You'd better make sure, because you could be subject to a provision that imposes criminal liabilities.

So I think there is a tendency to overreact when you have an ambiguous provision that seems to simply require that a company maintain accurate books and records.

It does not make sense to spend \$1 million to ferret out a \$10,000 grease payment for instance.

I think the Act would be greatly improved by S. 414.

Senator D'AMATO. Thank you, Mr. Chairman. Senator Heinz.

Senator HEINZ. Thank you, Senator D'Amato.

Chairman Shad, do you think that the enactment of S. 414 would in any way impact the SEC's ability to protect investors, who after all are the people above all that your mandate is to protect?

SEC PRIMARY RESPONSIBILITY

Mr. SHAD. No, sir, I don't. The Commission's primary responsibility is the protection of investors through the disclosure, antifraud and oversight provisions of the securities laws, which were in place here long before the Foreign Corrupt Practices Act.

And the actions that we've brought under the Act could have been brought under the preexisting law in order to protect investors.

Senator HEINZ. So what you are saying is that the provisions of the law that deal with the accounting systems and control systems and prevention systems that have to be maintained, you believe will be fully adequate to protect the investors who, if they are inadequate and if a company does in fact make some kind of illegal payment, could be quite severe for the officers of the company, and result in quite a problem for the shareholders of the company?

Mr. SHAD. Yes. The issue could arise in several different areas of the securities law in addition to the Foreign Corrupt Practices Act, including the proxy statements, the disclosures concerning officers and directors of companies, and the actual financial statements themselves.

If it rose to the level of material facts, it should be disclosed.

S. 414 REDUCES AMBIGUOUS SECTION OF PRESENT LAW

Senator HEINZ. How will S. 414 resolve uncertainties for issuers?

Mr. SHAD. By providing greater certainty.

Senator HEINZ. I'm sorry, I didn't hear it quite. How will it provide greater certainty?

Mr. SHAD. By reducing ambiguity.

Senator HEINZ. In what specific areas?

Mr. SHAD. Specifically, the bill could make the most ambiguous section of the present law, the books and records portion, an objective of the internal accounting controls systems rather than a flat requirement that a company maintain fair and accurate books and records in reasonable detail.

It also makes it clear that certain sanctions will not result unless one knowingly causes an issuer to fail to maintain adequate internal controls or knowingly circumvents such controls.

I think that concern over possible criminal liability would cause anyone, any manager or corporate executive, to overreact as to the degree of detail necessary in order to be sure to avoid such liability.

The bill also clarifies issuer's responsibilities concerning the compliance requirements of subsidiaries. That has been a vague area, and it reduces excessive compliance costs by making it clear that no criminal liability will result solely from failure to comply with the internal accounting controls requirements. In addition, no civil injunctions may be imposed for inadvertent errors or inaccuracies.

Senator HEINZ. What you're saying is, if there are omissions that have nothing to do with trying to cover up bribery, that those—that the fact that you have made some kind of an error is not—it subjects you to the full weight of the act?

Mr. SHAD. Correct.

Senator HEINZ. Your statement that both the SEC and the Justice Department have provided guidance to businesses as to how the FCPA will be interpreted and in addition a review of the cases brought under the act shows that it has not been used in many of the ways feared by businessmen.

My question to you is, isn't that really an argument for not changing the status quo of allowing both you and Justice to continue to enforce the act?

Mr. SHAD. Yes. That could be an argument, but I do not agree with the conclusion that therefore S. 414 should not be adopted.

Senator HEINZ. Why should we change it?

Mr. SHAD. Because the ambiguities which have arisen made it necessary for the SEC to issue guidelines, and the private sector has been required to rely on prosecutorial discretion, rather than on clear statutory requirements.

We are asking industry to depend upon the prosecutorial discretion of Government agencies. Administrations change and Commissioners come and go. Legitimate businesses need to have clarity in administration of the law so that they know what the rules are, and can be guided accordingly, rather than run the risk of criminal or civil prosecution.

Finally, in the absence of statutory clarity, advisers to business tend to be more conservative in their interpretation of the law, which further inhibits the enterprise results. Thus in my opinion, in excessive compliance costs far beyond even the Congress intent.

Senator HEINZ. Mr. Olmer, one question for you. You with Secretary Baldrige are charged with the responsibility for doing everything you can to assist Americans in exporting. That is a primary mission now of the Commerce Department; it has been for several years.

FOREIGN COMPETITORS USING FCPA AS A PROMOTION

Do we have any evidence of our American domestic companies having foreign competitors using the Foreign Corrupt Practices Act as a means for promoting, at our expense, their business?

For example, might a French firm going for a sale in a third country go to that buyer and say "You do not want to do business with this American firm because of this and that provision of the Foreign Corrupt Practices Act and you're really going to get in trouble?" Or "It will cause you to have to do this and that, and that is expensive?"

If that is so, what provisions are being used by hypothetical countries to scare people away from doing business with us?

Mr. OLMER. In many areas of the world in which this act takes on larger importance, it will not be a precise understanding of the nuances of the legislation that would cause a prospective buyer to shy away from it when warned by a competitor to U.S. companies. It would be the uncertainty of it, the fear that the American supplier, if awarded a contract, would become subject to liability that would prevent the American supplier from filling the terms of the contract.

There are bits and pieces of stories to that effect.

Senator HEINZ. Can you give us an example?

Mr. OLMER. In a Middle Eastern country, a U.S. company which had every reason to expect it would be designated a prime contractor lost that opportunity and was designated the subcontractor because we believe the foreign competitor, a Western European-based company, told the purchaser that the American company would be subject to the Foreign Corrupt Practices Act and there were all sorts of hazards to that which would put in danger the time frame within which the contract and the terms and conditions under it was to be fulfilled.

Unfortunately, an awful lot of this evidence—we call it evidence—is anecdotal, but it does come from people who believe most fervently that they are reflecting reality. It is their perception it often is the reality.

If I might, Mr. Chairman, I would like to thank you for correctly identifying one of the prime responsibilities of Secretary Baldrige

and myself in promoting U.S. exports, and of course, as you well know, the additional prime responsibility is enforcement of our Export Administration Act as well as our import laws. They rate in tandem.

Senator HEINZ. Thank you, Mr. Secretary.

Senator D'AMATO. Mr. Rose, I had a question for you.

Senator LAUTENBERG. Excuse me, Mr. Chairman, I know it is not a partisan thing. [Laughter.]

Senator D'AMATO. If I might ask the distinguished Senator from New Jersey to bear with me, because I only asked one question.

Senator LAUTENBERG. Certainly, Mr. Chairman, I yield.

Senator D'AMATO. I am only going to limit this to one question again.

Mr. Rose, I was going to refer to a question that Senator Proxmire put forth with respect to an article which I submitted to you dealing with the area of the Foreign Corrupt Practices Act and S. 414, and in that article Mr. Shine, whom you know was in charge of the enforcement procedures in connection with this, indicated that he expressed a concern that the definition of a facilitating payment in S.414 had some serious drawbacks as a result of its focus on the purpose of the payment rather than the status of the recipient.

Would you care to comment on that?

Mr. ROSE. I have just had a chance to glance at the article. I guess it was published earlier, a couple of days earlier this week.

Senator D'AMATO. Supposing we go to Senator Lautenberg and, if you care to, just review that with a little more depth. Maybe you will feel prepared to give us an answer on it.

Mr. ROSE. I am not sure I will, but I will be glad to go to Senator Lautenberg anyway.

Senator D'AMATO. You have another 2 or 3 minutes, Jonathan, to read that. [Laughter.]

Senator LAUTENBERG. I needed the time to assemble myself. I have a couple of things that I want to ask Chairman Shad and Secretary Olmer.

Mr. Olmer, in terms of your interest in promoting trade abroad, I make reference to some information that came from a GAO survey, March 1981.

It states that 67 percent of the respondents, when questioned about the influence of the effect of the act, said that the act had little or no business. Less than 1 percent reported a great decrease in business, and 72 percent responded that the act did not discourage foreign buyers or agents from doing business with companies who were surveyed.

Moreover, almost 89 percent claimed the act had no influence in limiting the number of countries in which they do business.

Do those statistics square with the picture, as you see it?

Mr. OLMER. No, Senator, they do not. More basically, they omit one large category, and that is the prospective exporter that you just don't know about.

I am not familiar with this statistical sampling. I did review the report when it came out, and it is not all that fresh in my mind, but speaking from my own personal experience and as an international businessman and as someone who has accompanied a

number of U.S. businessmen and talked with a lot of foreign businessmen, I cannot in honesty say that it just dominates their concerns over whether or not they will be successful.

But it was evident to me that it was a matter of some concern. It was a matter of some additional costs which must be borne, and it does weigh on the minds of some foreign companies and government officials in terms of, as Senator Heinz pointed out, ways in which U.S. companies get leveraged out because of this overhang of uncertainty from the act.

Senator LAUTENBERG. Out of respect to the professionalism of yourself and others who have presented their views here, I defer a little bit, but I do have to comment on what seems to be the subjectivity of the prospective companies that we are talking about. One feels that he was given second best because of this incident with a French company—I think that is what you said.

That is not particularly reassuring to hear because it may be impossible to quantify. You said you don't know—again to use a phrase that was used before—because you just cannot forecast what the effects would be.

What I am concerned about, is that I hear ambiguity as the focus of concern for in the changes that ought to be made I would, if I may, refer Chairman Shad to the cost/benefit of the accounting requirements—I think that is the terminology.

Aren't these accounting practices those that should be used in the conduct of proper business, in any event? Is it particularly burdensome, Mr. Shad, for those companies?

Mr. SHAD. Our responsibility is for full disclosure, but not to enforce our judgment for what is good management practice. That could have to do with whether they are doing good R&D or a lot of other things beyond accounting controls.

Senator LAUTENBERG. But it is the responsibility of the SEC in keeping the investor informed, isn't it, to make certain that there are reporting requirements that are met?

Mr. SHAD. That is correct, and whether or not the Foreign Corrupt Practices Act was on the books, that would still be an enforceable responsibility of the Commission.

Senator LAUTENBERG. Can I ask you this, then, Mr. Shad: Why wouldn't it have been appropriate—instead of rewriting the FCPA, for the SEC to jawbone with the business community and work out regulations they could live with without having—

INDUSTRY AT THE PERIL OF PROSECUTORIAL DISCRETION

Mr. SHAD. That is what we have been doing. We have issued statements of policy on this, and, notwithstanding that, industry is concerned about at the peril of prosecutorial discretion.

They are now dependent on the reasonableness of the government agency in enforcing a statute that is ambiguous and uncertain.

The uncertainty in these areas has caused companies, in my opinion, to build excessive safety factors into their compliance efforts. They do not want to end up in an enforcement proceeding with the U.S. Government.

Some have asked us, "Why haven't you brought more cases?" We have brought a lot of cases, particularly during the last year and a half. When you put a law like this on the books, most companies, and their lawyers and accountants, get together and decide what they have to do to comply.

I think there have been excessive compliance costs because of the ambiguities in the present law.

Senator LAUTENBERG. Except that I think that trades off in some way. Again the view of a relative amateur here, it trades off in some way in a kind of leadership, both moral and political, for our country that may exceed an opportunity for what I think is short-term gain in foreign trade.

We have an edge in so many areas and certainly in areas of technology. If we can develop the business practice that conforms with the quality of our service, I do not know that we really are disadvantaged by extra scrutiny.

In your area of the SEC, I believe—and there I had contact, never under prosecution or investigation by the SEC, but as an interested observer in making sure that we kept our fingers very clean—that there has been a good record of prosecution and enforcement by the SEC. And I would have thought that they could have continued to perform that service and review, and perhaps are better equipped because of their knowledge of business practices, accounting, and so forth, than the Justice Department.

But again I defer until I find out more about it.

Mr. SHAD. May I respond to what you just said? S. 414 will simplify and facilitate our enforcement of the Foreign Corrupt Practices Act. This will help us do a better job.

Senator HEINZ. Secretary Olmer, would you like to comment on the observation which—as I understood what Senator Lautenberg said, it is that we have such a clear competitive edge we do not have to worry about some minor disincentives, such as the Export Administration Act, the Foreign Corrupt Practices Act, and another half a dozen—

Senator LAUTENBERG. Is there time for rebuttal here, Mr. Chairman?

Senator HEINZ. By every Presidentially appointed commission since the time of John F. Kennedy, by the way. But maybe you could confine it just to the Foreign Corrupt Practices Act in this case, whether we have such a great lead that we can sit back, relax, and watch our trade balance go even further to hell?

Mr. OLMER. Thank you, Mr. Chairman.

Just with respect to the FCPA, I do not believe it is a fair characterization to say that American know-how and technology and management skills and products and services are in such high demand, by such a high degree over their nearest competitors that any disincentive can be accommodated by that superior competitive position.

The evidence strongly suggests that we are scratching very hard to maintain our head above water. And, in particular, if you look across industrial sectors in the Third World, we have lost market shares steadily. We have lost it for a variety of reasons. I am not prepared to say it is the overriding reason, but it is a significant reason.

You made a comment, Senator Lautenberg, about the virtue, as I take it, of the act because it demonstrates American political and moral leadership. I can tell you on the basis of my own observations that both foreign businessmen and foreign government officials think it is ludicrous.

Senator LAUTENBERG. Sure, they do.

Mr. OLMER. We are not changing their moral standards. The attempt, as it would appear, to export our standard of morality I can assure you has failed before it even gets off the ground.

Certainly, this act is not going to be the vehicle by which we would accomplish it, not at all.

Senator LAUTENBERG. Forgive me, Senator Heinz.

Senator HEINZ. If you would like to follow up.

Senator LAUTENBERG. I would like to respond if I may.

Senator D'AMATO. On the chairman's generous time. I have only asked several questions.

Senator HEINZ. This chairman reserves the balance of his time.

Senator LAUTENBERG. I am the only Indian until Mr. Proxmire came back with two chiefs. [Laughter.]

I do not suggest complacency. I do not suggest that business—and my own record would justify these comments—ever automatically gets you business leadership. I do not think that we can sit back on our computers, or any technology and expect the business to come drumming through the door.

Mr. Olmer, you ascribe a certain degree of naivete to me when you suggest that. If we lose our edge in the Third World countries—as you describe it—because there is a concern about what we deem corrupt, I would have to say, frankly, so be it.

I am not a preacher nor a minister, and I am not exporting morality. You have to work very hard at getting business. You know it, and I know it, and it will not help to blame problems on ambiguity in the law as a result of our loss of business.

When we sit back and are not diligent about business opportunities, that's where we lose out. American technology does have the edge that entitles us to do business on better terms than most others.

And again, having had some limited experience in business in Europe and South America in the field of technology, I know that.

And we work against governments who would conspire to keep us from getting our fair share of the marketplace with all kinds of devices, including, as we know, very well know, corrupt practice. It is aggression: whether they bring us down to their level or we can elevate them to our level. I think that the law ought to be strong, I think it ought to be firm, I think it ought to be fair. But I do not think that fairness includes a hands-off perspective by our government that says, "OK, guys, go get it."

So, I do not think we are really at odds on this thing. And maybe there is a difference in the degree of the importance that we place on it.

Senator D'AMATO. Senator Heinz.

Senator HEINZ. Two brief questions for Mr. Rose, representing the Justice Department.

ISSUES OF CONTROVERSY

Mr. Rose, to really put what I think the nub of the discussion and perspective thereto—there are two major issues that have some controversy. The reason to know standard, the issue of facilitating, expediting payments, the grease payments, may be a lesser issue on the accounting standards. Personally, I do not think so.

Senator Proxmire has described the accounting standards section, as we have redone it in this bill, as being an improvement. I think the Senator would back me up on that.

If I am misquoting him in any way—

Senator PROXMIRE. A clarification. I'm not sure it is an improvement, but I would not do it to fight with the accounting standards that much.

Senator HEINZ. On the reason to know, the last time around on this measure, it was argued that the bill would allow corporate executives to escape liability for bribery attempts, from which they were careful to insulate themselves—the question of expressly—or by course of conduct.

In your view, would the law, as amended by S. 414, be able to get at the knowing wink, or the pregnant nod as sometimes it is called?

Mr. ROSE. The language, as you currently have it—and I do not, unfortunately have a current copy of the bill before me—was satisfactory to us, sir.

Senator HEINZ. You believe that a corporate executive says, to his overseas representative, "Go ahead and do whatever you have to do to get that sale," even though he has not expressly authorized a bribe, that if he, through a course of conduct, direct or indirect action, as I think I have just described what I call an indirect action—do you believe that you could—

Mr. ROSE. Reach it with that language? Yes, sir.

Senator HEINZ. That is very important. That is a key question.

Now, the other issue is the extent to which facilitating or grease or expediting payments may cause a problem. The concern, of course, is that something that is bribery, with all the connotations of that term, something that is illegal, something that we should not countenance any corporate executive or agent of a corporate executive doing somehow might slip through under the language of section 104 (d) and (c) on page 8 of the bill.

Let me ask you this. Since we last considered this piece of legislation, there have been, in fact, a couple of well-publicized incidents. Those incidents, which I do not want to get into naming, have occurred, demonstrating the need for statutes banning bribery of foreign government officials by U.S. companies. You are aware of those cases, I am sure.

Mr. ROSE. We brought them, yes, sir.

Senator HEINZ. That's why I know you are aware of them. [Laughter.]

My question is whether those cases would still have been illegal and the ability to prosecute them any different if the provisions of S. 414 had, in fact, been law?

Mr. ROSE. To my knowledge, the answer to that is "no."

Senator HEINZ. So, you could have done exactly the same thing?

Mr. ROSE. Yes.

Senator D'AMATO. Senator Proxmire.

Senator PROXMIRE. First, I would like, for the benefit of those who have been saying that we are imposing our morality on somebody else, that is not what we are trying to do at all, in any way, shape or form.

I think one of the best expressions of why this is needed—not just for this country, but for other countries—was expressed by the Attorney General—Botswana.

Let me read it.

Certainly no self-respecting African nation would have considered U.S. legislation aimed at curbing corrupt practices at American transcontinental enterprises to be interference. On the contrary, most Third World nations would appreciate such legislation. You see, developing countries have difficulties in discovering offenses committed by U.S. corporations insofar as they are bribing and corrupting of local government officials.

Why do you think all of these disclosures are coming out of Washington, not out of our host countries?

On this particular issue, most Third World countries would want to cooperate to the fullest extent possible with the U.S. and other countries to make sure that the offending transaction or enterprise is finished.

Another result of the U.S. adopting such legislation is that the Third World will acquire a healthier respect for the U.S. and its transcontinental enterprises.

The country in which the bribe is paid suffers. The only one who gets the benefit is the guy who gets the money and the corporation who pays it. But the company will get a product of lower quality, and they will lose. This is in the interest of the company that buys. It is not a matter of imposing our morality. It is a matter of acting in a way in which they can act.

Our agencies can work with our corporations far more effectively than the instrumentalities of a developing country.

COMPANIES UNDER INVESTIGATION

Mr. Rose, according to the Wall Street Journal, as recently as November 1981, Justice had 54 companies under investigation for FCPA violations. Now 14 cases are open.

Would the Justice Department supply to the committee the closing memorandums in each of the investigations closed so that the committee may for a judgment as to how vigorously the Justice Department enforces the act?

Mr. ROSE. I do not believe it is our practice to supply closing memorandums. We will certainly be willing to supply you with basic facts and descriptions as to the cases that we have been bringing.

We think we have been enforcing this act exceedingly forcefully. We just had an indictment yesterday. We have had several indictments within the last month.

You get to a question of allocation of prosecutive resources as to what cases are worth bringing. But we think we have been enforcing this act as vigorously as any other.

Senator PROXMIRE. Why can't we have the closing memorandums? The case is closed. That is it, it's history. Why can't we have that?

Mr. ROSE. I would have to defer the question as to what our basic departmental policy is on what kinds of documents we share with committees——

Senator PROXMIRE. Would you either, then, give us a memorandum as to why the closing memorandums cannot be available or give us what you have just—and give us what you just suggested or give us the closing memorandums.

Mr. ROSE. I will give you a response, yes, sir.

Senator PROXMIRE. In a recent article of Mr. Shine with respect to the exemption in S. 414 for facilitating payments to government officials to expedite routine government action—and I questioned Mr. Chafee on this earlier—and I quote—"One may anticipate endless argument about whether a particular governmental action is routine."

"For example, if a foreign official's daily activity is the awarding of contract, with a payment to him in return for the contract, would that be unlawful? That could only increase statutory ambiguity and unpredictability." My prediction it is too broad and would swallow the rule.

What is your testimony?

Mr. ROSE. Senator D'Amato just referred this article to me, and I have now had 15 minutes to look at it. I would like a little more time to study it and work with the committee on it.

I personally think we may be getting into a swamp if we follow Mr. Shine's suggestion of going for a discretionary payment. But I would like a chance to think about that. It just came out this Monday. I would be glad to work with the committee on it.

Senator PROXMIRE. A high Department official in Justice said, "I have questions about the Foreign Corrupt Practices Act. It is the law, and it is easy to apply."

I agree, it is the law and it is easy to apply. But he keeps getting criticized for being vague.

What is the standard that the Justice Department applies under the "know" or "have reason to know?" Is it more than reason to suspect?

And if the Justice Department is clear on its interpretation, why cannot that be communicated so amendments are not necessary?

Mr. ROSE. I am not sure, if you asked the same official, if you would have the same answer to that question today. I think that may have been an offhand answer to a wide-ranging interview, because I do not think it is easy to apply. That is one of the reasons we are all up here.

Senator PROXMIRE. He is the Deputy Attorney General——

Mr. ROSE. I am aware of who it was.

Senator PROXMIRE. Who is Mr. Giuliani?

Mr. ROSE. He is the Associate Attorney General.

But that was a wide-ranging interview, as you may note, in covering drugs and a whole variety of subjects.

Senator PROXMIRE. It was on bribery. The article is on bribery.

He says bribery gets a lot less attention with cutbacks in the Justice Department. I am sure you liked the headline.

Mr. ROSE. I was not in love with it.

Senator PROXMIRE. The Justice Department has redirected its efforts away from FCPA cases to other types of fraud according to

this article. And Justice has few complaints or tips about foreign payoffs.

A Justice official was quoted as having said, "I do not see any reason to have eight lawyers sitting around and handling five complaints a year."

Isn't that a passive position for a prosecuting agency?

That position seems to be that the Justice Department is not particularly interested in FCPA. And unless the case is brought to its doorstep, forget it.

Mr. ROSE. I really have to contest, Senator, the notion that that is a passive position for a prosecutorial agency. I think most prosecutions are undertaken because of complaints. I do not think you find an awful lot of prosecutors—particularly in our kind of work, which is a backup jurisdiction. We undertake work because we get complaints.

When I worked in the Antitrust Division, those were the investigations we started. If we did not get the complaints about an industry, we tended not to just, *sua sponte*, start an investigation of it.

I do not think that would be a fair charge to make, no.

Senator PROXMIRE. In view of the fact that we had a scandalous situation a few years ago, before this became law, it sounds as if the law is working pretty well.

Mr. ROSE. We find that we are having difficulty. And I think the business community and those agencies that are dealing with the business community are coming to you for some legislative relief, because what we are hearing is that there are a lot of transactions that are not entered into simply because people do not want to be bothered with a potential liability and they would just as soon shy away from the transaction as get involved, potentially, with this particular statute.

What we would like is a clear enforceable statute that would not detract from the exports of the United States. That is what this committee is trying to fashion.

Senator PROXMIRE. In terms of the article, it said:

"Justice is spending a lot less time these days looking for evidence of overseas bribes."

According to the Journal, the Department eliminated that multinational fraud branch, which once reviewed hundreds of cases for possible prosecution. Justice now has three lawyers working full time on foreign payments cases.

Why has the Justice Department deemphasized it?

Mr. ROSE. We had a special situation there, where, as I think you will recall, Senator, the SEC referred to the Justice Department a massive number of potential cases which had been, brought to the SEC by the corporations. Once that massive number of cases had been gone through, it simply did not seem sensible to have a lot of people on trips to Chad or somewhere else, to just participate in useless activities. We would be up here for that reason, if for no other.

When we get a clear complaint in this area, we certainly go after it.

I have talked with the prosecutors who are in charge of this area, and they are perfectly prepared to go after this kind of case, like any other.

That was such a special situation, with such a massive number of cases, that it does not seem to us to require quite the same degree of manpower it did.

Senator PROXMIRE. Mr. Shad, why do we need to alter the accounting provisions of the current law at all?

SEC is interpreting them in a reasonable manner. Certainly no one has gone to jail or has been sued for inadvertent bookkeeping errors.

Haven't corporations learned to live with the accounting provisions? And haven't they been a net benefit to insuring the accuracy of financial statements?

Mr. SHAD. As to the last, I do not have the facts to answer affirmatively that there is an improvement. All of these companies have been subject to generally accepted accounting principles. They have certified financial statements.

I do not know that there is a basis to say that it has improved the financial statements. As to the reasons for amending it, the flat statement is that a company shall be required to keep accurate books and records. That has caused great uncertainty, not only among business but among regulators, as to what is required.

In your absence we were talking about prosecutorial discretion. It is at the peril of industry that they are relying on the SEC's prosecutorial discretion.

I think the private sector is entitled to greater certainty, greater clarity, and that it will facilitate enforcement rather than inhibit it.

Senator PROXMIRE. The SEC has not gone overboard in the enforcement of this law. It has been very reasonable.

Let me ask you this. There are a number of changes made in the accounting provisions of the current law in S. 414. The changes were primarily intended to make clear statutory language; namely, nitpicking, nickel-and-dime or inadvertent errors were not to be actionable and accounting systems would be cost justified.

Mr. SHAD. I am not sure what you are quoting from. Was that the policy statement of the SEC?

Senator PROXMIRE. Policy statement of Proxmire. [Laughter.]

Mr. SHAD. I thought you were referring to a policy statement by the SEC on that point.

Senator HEINZ. Old or New Testament?

Senator PROXMIRE. In general, I was quoting committee reports that we had.

Senator HEINZ. That is the King James version?

Senator PROXMIRE. It was not the King John. [Laughter.]

ENFORCEMENT OF S. 414 ACCOUNTING PROVISIONS

If the accounting provisions of S. 414 are passed—Senator Heinz knows how to show me off balance—if the accounting provisions of S. 414 pass, would the SEC enforce them in essentially the same way as current SEC enforcement of the current accounting requirements.

If the bill that we are proposing, being proposed here, passes, would it be enforced in the same way?

Mr. SHAD. If we had had this present bill on the books, we would have brought the same cases that we did bring, but we might not in every case have cited the accounting provisions of the Foreign Corrupt Practices Act. All the injunctive actions we have brought have involved violation of disclosure requirements, not just the accounting provisions. For example, cases have involved misleading financial statements or proxy violations and other violations. None of our cases, unfortunately, have actually gone to court decision.

Twenty of them have been settled by consent where they agreed not to do it again, but neither admitted nor denied that they had done anything wrong. And we have four cases pending.

So we do not have the benefit of any judicial interpretation of these accounting provisions.

Senator PROXMIRE. Page 5 of your statement, you say that S. 414 would eliminate the requirement that accurate books and records be kept in reasonable detail.

Doesn't S. 414 retain this requirement, while making clear such books and records are required to be kept in connection with—

Mr. SHAD. Yes. S. 414 incorporates that language within the objectives of the internal accounting controls rather than making it an independent requirement, as it is now.

It makes that language one of the five objectives of internal accounting controls. It does not eliminate it, but it does move it from an absolute requirement, to one of the five objectives of an effective internal accounting control system.

Senator PROXMIRE. S. 414 would remove from SEC jurisdiction the enforcement of the anti-bribery sections of FCPA.

There is an argument there on the criminal side, but should not SEC retain jurisdiction to civilly enforce the anti-bribery provisions against an SEC issuer if the company behaved recklessly as a result of a bribe paid on behalf of the company to a foreign government official?

Mr. SHAD. As you know, when the act was passed, Chairman Roderick M. Hills, who was then chairman of the SEC, argued that the bribery provisions raised national issues that were not directly related to the securities laws. He seriously questioned charging the SEC with enforcement responsibilities by that portion of the law.

We are not in the business of monitoring day-to-day activities of companies. Our primary mandate is to provide proper disclosure and prevent fraud.

We do not oppose the consolidation of enforcement of the anti-bribery provision in the Justice Department.

Senator HEINZ. May I note that Mr. Dennis Lamb of the State Department is also here on behalf of the administration. My understanding is that he fully supports what Secretary Olmer, USTR Brock, Mr. Rose, and others have said.

Thank you very much for being here.

Senator D'AMATO. Thank you for your participation. And now, our last panel.

[Complete statement of Mr. Lamb follows:]

STATEMENT BY DENIS LAMB, DEPARTMENT OF STATE

The Department of State is pleased to have the opportunity to submit this statement on amending the Foreign Corrupt Practices Act of 1977.

The Department would like to emphasize once again its firm support for the goals of the FCPA. Bribery is not in the interest of our companies and it harms our foreign relations, national security and economic interests. It can weaken political stability, erode popular support for foreign governments, and jeopardize important interests we share with our friends abroad.

Despite its undeniably good intentions, however, the Foreign Corrupt Practices Act has created undesirable side-effects for U.S. interests abroad. First, it has unnecessarily impeded U.S. exports. Second, foreign officials have been irritated and embarrassed by certain U.S. firms' compliance efforts, and thirdly, problems have arisen with the extension of U.S. antibribery concepts to societies with widely varying laws and customs.

These undesirable consequences can be minimized—we can have a strong law against bribery without so many unneeded side-effects. As we stated in both Senate and House testimony in the 97th Congress, the Department of State believes S. 708—and now its successor, S. 414—will constructively resolve many of these unforeseen difficulties.

Regarding my first point, our foreign service posts have indicated that the FCPA creates serious problems for U.S. exporters—problems not directly associated with the Act's ban on bribery. Both in 1981 and in 1982, the Department surveyed all diplomatic posts and found that the Act hurts legitimate business transactions by causing overcautiousness by American firms in trying to comply with the Act, confusion over what is a legitimate gift, problems related to local agent, difficulties in negotiating joint venture contracts; and heavy accounting expenses.

As a result of these difficulties, many U.S. firms have foregone exports, avoided markets, and opted to play subordinate contracting roles to foreign prime contractors.

We also found the FCPA's detrimental impact on U.S. firms occurs primarily in developing countries with whom the United States has substantial trade, particularly in the Middle East and Asia. We cannot overstate the importance of sustaining U.S. exports to these two regions. In our 1981 survey, 60 percent of the important posts in the Middle East and Asia said the act has caused U.S. firms to lose business from problems not directly associated with the prohibition against bribery. These findings are consistent with previous foreign service reporting and with the conclusions reached by Senator Bentsen's East Asia study mission of 1981, a venture supported by the Department of State.

The second side-effect mentioned is irritation and embarrassment caused to foreign officials and other prominent foreign citizens by U.S. firms' attempts to comply with the Act. American firms operating abroad are often required by local law to be represented by local agencies. In many instances, foreign officials control, or are associated with, agencies with which U.S. companies have been able to do business. But the FCPA has stopped U.S. firms from dealing with such agencies. This has irritated and embarrassed foreign officials, who rightly resent what they perceive as the Act's general implication of misconduct on their part.

In the United Arab Emirates, for example, it is common for an individual to work in a governmental capacity in the morning and in a commercial position in the afternoon. Our Embassy reports that many reputable U.A.E. businessmen resent what they perceive as a questioning of their honesty in business dealings with U.S. firms intent on complying with the FCPA. In Muscat, our embassy notes that Omani nationals are sensitive to the fact that holding government office and pursuing outside business interests at the same time often creates a *prima facie* appearance of potential problems. In Saudi Arabia, the embassy tells us that in order to protect themselves from FCPA uncertainties, U.S. companies have sometimes insisted that protective language be inserted in contracts. The Saudis have generally taken offense at the implication they are corrupt, and bad feelings have occurred. The result: major negotiations have been extended at considerable cost, and some agreements unnecessarily jeopardized.

The Department feels that any change in the Act should make clear that involvement of foreign officials in legitimate business transactions is not a violation of the law *per se*. U.S. firms need assurance that conducting legitimate transactions with agencies which are associated with foreign officials, and allowing such officials to participate in joint ventures or stock ownership, are permitted. But it should also continue to be clear that offering such an individual a bribe to use his influence to obtain a contract is blatantly illegal.

The last side-effect—the difficulty presented by the extraterritorial reach of the Act—is both a theoretical question and a practical problem.

The theoretical question relates to the appropriate extraterritorial reach of one country's criminal jurisdiction. The problem arises when information regarding activities of foreign officials is made public.

In May, 1981, the United Kingdom expressed concern to our embassy in London that provisions of the Act could be applied "to persons incorporated and/or carrying on business in" that country. The government of the U.K. does not condone illicit payments, but does believe that, as a matter of its own sovereign jurisdiction, that companies incorporated and doing business in the United Kingdom are subject only to U.K. law in respect to their activities there. That view was expressed formally in the U.K.'s Diplomatic Note No. 146 of July 23, 1981, to the U.S. Government.

Furthermore, the FCPA was cited as a factor in the recent decision by the British Government to disallow the acquisition of the Davy Corporation, a British firm, by the Enserch Corporation, a U.S. company. The U.K. Monopolies and Merger Commission felt that if acquired by Enserch, the FCPA might negatively affect Davy's business prospects in certain countries. The Commission stated that this might occur because Enserch's policy, in complying with the FCPA, is "to avoid altogether the use of any agent who is a government employee in a position relevant to the contract even if the commission is reasonable and the individual effective and honest."

In general, the Department has observed that a number of countries are finding the extraterritorial scope of U.S. law objectionable. Australia, Canada, and Germany have joined the U.K. in voicing similar concerns. The U.S. Attorney General acknowledged this trend in a public speech. "There is a growing wave of sentiment," he said, "suggesting that the United States has adopted much too broad a view of its jurisdiction over activities that affect more than one nation and involve conduct not wholly confined to our territory."

The extraterritorial application of U.S. antibribery legislation also creates problems associated with public disclosures related to enforcement of the Act. Past public disclosures from enforcement proceedings and press leaks—regarding both legitimate and illicit payments to foreign officials by U.S. firms—have embarrassed the officials and created difficulties in our relations with them. This is especially true in countries where certain practices are legitimate under prevailing laws. In some cases, the host countries have investigated and/or prosecuted the officials involved, while in others this has not been done. Host government decisions regarding prosecution of their officials are based, *inter alia*, on the laws and customs of the host country, internal political considerations, and particulars of the specific case.

In summary, we must balance two conflicting interests: Restricting potentially damaging business practices by U.S. firms while establishing an acceptable limit on the imposition of our own standards on others. The provision in S. 414 to exclude from prosecution actions which are legal in the country in which they occur would help achieve such a balance. If enacted, this provision would significantly reduce the impression that the United States is imposing its own judgment on standards which other countries have chosen to set for themselves.

The United States has tried to negotiate an international agreement on illicit payments since 1976. A U.N. Economic and Social Council (ECOSOC) committee completed preparatory work in 1979 on a largely agreed draft, but the ECOSOC and the U.N. General Assembly have failed since then to take any action to conclude an agreement. This is largely due to the insistence of the developing countries on linking an illicit payments treaty with a still uncompleted code of conduct for transnational corporations. The U.S. and our major western allies have consistently opposed such linkage.

At the Venice Summit in June 1980, our government made a commitment to work in the U.N. toward an illicit payments agreement, but, if that effort faltered, to seek to conclude an agreement among the summit countries. After the General Assembly failed to reach agreement on a treaty, our representative stated that the U.S. intended to consult with other states about alternative ways to secure a treaty.

This issue was not addressed at the 1981 Ottawa Summit. The U.S. sought a summit agenda focused on the most urgent problems confronting the major industrialized countries, rather than as detailed list of special interests. There was also the consideration that Congress then had before it a bill which might have resulted in legislation strengthening our international negotiating position.

In October 1981 we asked other OECD countries if they would be interested in an agreement only among OECD members. We found no positive interest by them and even some objections to doing so. Opposition focused on the member countries' jurisdictional differences, which make achievement of such an agreement difficult. There has been little meaningful international discussion of the issue since then.

It is going to be hard to make progress on an international agreement on illicit payments. But we ought to try, for two reasons: First, it would enhance efforts to repress bribery and extortion in international commercial transactions, and second, it would reduce the competitive disadvantage to U.S. firms caused by provisions of the FCPA.

It is widely agreed, however, that enactment of a law similar to S. 414—which would serve to prohibit bribery without undue harm to exports—would enhance our efforts to achieve an international agreement. Our trading partners are well aware of the problems U.S. businessmen have experienced under the FCPA.

In conclusion, the Department of State believes that amendment of the FCPA along the lines of S. 414 would provide a more realistic standard for U.S. corporate activities overseas, aid U.S. exports, reduce irritants to foreign officials, and improve the chance of reaching an acceptable international agreement. We hope the Congress will consider amending the Act soon, and are ready and willing to work with this committee to that end.

STATEMENTS OF JOHN SUBAK ON BEHALF OF THE EMERGENCY COMMITTEE FOR AMERICAN TRADE, GROUP VICE PRESIDENT AND GENERAL COUNSEL, ROHM & HAAS CO., PHILADELPHIA: JOHN M. FINCH, PARTNER, OFFICE OF THE CHAIRMAN, ARTHUR YOUNG & CO., CHAIRMAN, SUBCOMMITTEE ON CORPORATE FINANCE AND MANAGEMENT, NATIONAL ASSOCIATION OF MANUFACTURERS; MICHAEL A. SAMUELS, VICE PRESIDENT, INTERNATIONAL CHAMBER OF COMMERCE; AND WILLIAM BLASIER, GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS

Senator D'AMATO. Mr. Finch, Mr. Blasier, Mr. Samuels, and Mr. Subak, the afternoon has been long. We thank you for your patience, you may proceed.

Senator HEINZ. If I could, before they start, I would welcome Mr. Subak, who is a valued constituent; represents, among other things, with great distinction, the Rohm & Haas Co., where he is the group vice president and general counsel.

John, we are glad to see you. We appreciate your many contributions in this and other hearings.

Mr. Chairman, thank you.

Senator D'AMATO. Mr. Subak, why don't you proceed?

Mr. SUBAK. I was going to introduce myself, but Senator Heinz was kind enough to do that.

I am here on behalf of both Rohm & Haas Co., and the Emergency Committee for American Trade. We both support S. 414, and we thank very much, both of you, as well as Senator Chafee and Senator Garn, for your action in trying to amend the Foreign Corrupt Practices Act.

Rohm & Haas is a medium-sized chemical company, and I guess it is typical of the type of companies which have to live with the act in their day-to-day activities.

SHOOTING OURSELVES IN THE FOOT

Let me just say where we support S. 414 while we are here. In part, I guess it is, as Senator Heinz said earlier, we would prefer to stop shooting ourselves in the foot.

We would like to get some help in being more competitive in the world market in which we compete. Specifically, we believe that we spend money on accounting records and procedures which are not cost effective and which are not, therefore, sensible.

Second, we feel that the vagueness and imprecision of the "reason to know" test has resulted in our walking away from legitimate foreign businesses because we cannot and will not take the risk of criminal penalties, with a statute as vague as the current FCPA is.

Third, because of the lack of any specific exclusion for facilitating payments, we spend considerable effort trying to work with the quaint phrase "ministerial and clerical" in trying to decide what is legitimate and what is not.

We, therefore, support both the changes in the accounting provisions and those with respect to the payment provisions.

We believe that the deletion of the separate recordkeeping requirements and including them as part of the internal and control requirements makes good sense.

We clearly support the shift to a cost/benefit analysis in the accounting provisions.

We support the elimination of the "reason to know" test, since we are quite willing to be responsible for our acts or for the acts of others whom we might direct.

And we, finally, support the elimination of the—of this "ministerial and clerical" bit and the language that S. 414 would substitute.

As Senator Chafee indicated in his comments, clearly our feet are not cast in concrete, and we would be very happy to work with the committee and the staff if there are refinements in the language that would be helpful.

Basically, we are here wholeheartedly to support the act and to thank you for all your efforts.

Senator D'AMATO. Thank you very much.

[Complete statement follows:]

PREPARED STATEMENT OF JOHN T. SUBAK, GROUP VICE PRESIDENT AND GENERAL COUNSEL, ROHM & HAAS CO., ON BEHALF OF EMERGENCY COMMITTEE FOR AMERICAN TRADE AND ROHM & HAAS CO.

SUMMARY

My name is John T. Subak, and I am Group Vice President and General Counsel of the Rohm and Haas Company. Today, I appear as a witness for the Emergency Committee for American Trade (ECAT).

Rohm and Haas Company and ECAT support S. 414, the Business Accounting and Foreign Trade Simplification Act, introduced by Senator Heinz, with Senators Chafee, Garn and D'Amato. Identical to the Senate-passed S. 708 of the 97th Congress, S. 414 generally amends the Foreign Corrupt Practices Act of 1977 (FCPA).

ROHM AND HAAS CO.

Rohm and Haas Company is a medium-sized manufacturer of specialty chemical products (polymers, resins, monomers, plastics, industrial chemicals and agricultural chemicals). It has over 11,000 employees world-wide (7,790 in the United States) and has subsidiaries or affiliates and manufacturing locations in twenty countries. In 1982, the Company had sales of \$1.828 billion, approximately 63 percent in the United States and 37 percent abroad. The Company's competitors are primarily larger chemical companies, many in Europe and Japan. In March 1976, the Company filed with the SEC a 10-K report summarizing approximately \$750,000 of improper or questionable payments made by its foreign subsidiaries during the 1971-1975 five-year period.

ACCOUNTING STANDARDS

The FCPA as it now stands mandates internal accounting control requirements that far exceed traditional control systems designed to assure the accuracy in all

material respects of financial statements. For example, the accounting provisions of FCPA apply to every transaction of the company and its subsidiaries, whether foreign or domestic and whether or not related to the kinds of payments proscribed by the anti-bribery provisions. This places great burdens on internal auditors to document and maintain international accounting systems and controls which, to meet the requirements of FCPA, may well exceed what is required or indicated by good accounting practice. The required paperwork is considerable; indeed, the expenses of compliance may exceed the amounts to be controlled. These accounting requirements are thrust upon a company regardless of cost-benefit considerations. Thus, U.S. companies such as Rohm and Haas have been expected to develop and maintain procedures and controls to audit for immaterial amounts at an unjustifiable cost.

S. 414 is a significant improvement over present law. I would have preferred if S. 414 adopted a materiality standard. It does not. Instead, in speaking of "reasonable assurances" and "reasonable detail", it adopts a prudent man standard, including a cost-benefit analysis. By thus recognizing that a cost-benefit analysis is appropriate, S. 414 makes substantially more accounting sense than the present FCPA. Accountants are accustomed to applying cost-benefit standards; enacting these standards in the statute is a major improvement.

THE ANTIBRIBERY PROVISIONS

The bribery of government officials—foreign or U.S.—is wrong. It is detrimental to American foreign policy interests as well as the long-range business interests of American companies. S. 414 would continue the prohibitions against bribery while removing some of the unrealistic requirements that substantially increase the cost of doing business by U.S. companies.

The reason to know test

The FCPA prohibits payments by a company to "any person, while knowing or having reason to know" that a foreign official will ultimately receive the payment. Under this vague and broad standard, liability can be imposed on a U.S. company which had no intention of making an improper payment. "Having reason to know" of improper conduct by an agent or distributor in a foreign country is the wrong test for a criminal penalty imposed by U.S. law.

S. 414 focuses on the problem in a more rational manner. The U.S. company is held liable for the acts of its agents, distributors and affiliates if it expressly or by a course of conduct directs or authorizes the corrupt payment. Thus, companies are held responsible for their own actions and for the actions of others if they approve or condone their conduct. That is a rule consistent with American law. Furthermore, it is a workable standard.

Grease payments

In passing the FCPA, the Congress recognized that certain so-called token gifts or gratuities would not violate the law. Nevertheless, the Act contains no statutory exemption for these payments. S. 414 cures this deficiency by specifically excluding payments to secure "routine governmental action".

CONCLUSION

The present language of the FCPA is too vague and too broad. It should be amended. Rohm and Haas Company and ECAT support S. 414. We recognize there are variations of S. 414 which could serve at least as well in clarifying the FCPA, and we would be glad to work with the Committee members and staff to help shape the remedial legislation that is so sorely needed.

S. 414 addresses and helps to cure the principal problems inherent in the FCPA. We urge its passage.

Senator D'AMATO. Mr. Finch.

**TESTIMONY OF JOHN M. FINCH, PARTNER, OFFICE OF THE
CHAIRMAN, ARTHUR YOUNG & CO., CHAIRMAN, SUBCOMMITTEE
ON SECURITIES, NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. FINCH. I would like to defer to Mr. Blasier, who will summarize his statement, and then, if anything, I will add comments on the accounting provisions.

Thank you.

**TESTIMONY OF WILLIAM BLASIER, GENERAL COUNSEL,
NATIONAL ASSOCIATION OF MANUFACTURERS**

Mr. BLASIER. Mr. Chairman, my name is Bill Beasier. I am general counsel of the National Association of Manufacturers.

Mr. Finch, on my right, is a partner in the office of the chairman of Arthur Young & Co., and also chairman of NAM Corporate Finance and Management Subcommittee, which deals with securities legislation, and he will answer any questions you have concerning our position on the accounting provisions of S. 414.

We have also prepared a full statement that I would like to offer for the record. In the interest of time I will briefly summarize its contents.

[The complete statement follows:]

STATEMENT OF WILLIAM E. BLASIER, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman, my name is William Blasier, and I am General Counsel of the National Association of Manufacturers. The NAM is a voluntary, non-profit organization of more than 12,000 companies, large and small, located in every state of the Union. It represents firms which account for about 80 percent of American manufactured goods output and approximately the same percentage of the nation's industrial jobs.

I would like to address my remarks this afternoon not only to the legislation which is the subject of this hearing (S. 414) but to the total process of the reform of the 1977 Foreign Corrupt Practices Act (FCPA). This is now the tenth hearing held by Congress in less than two years on a subject which is complex, and at times even obscure, but also of critical importance to the export competitiveness of American industry. Let me briefly summarize where we stand now:

Deterioration of the U.S. trade balance indicates that the Foreign Corrupt Practices Act today remains as important a disincentive to exports as it was two years ago. We do not condone bribery of foreign officials as a means of obtaining business. But we do feel that any law enforcing this principle should not contain vague and arbitrary provisions which needlessly discourage exports or increase accounting cost overheads.

The legislation passed by the Senate in 1981 was a marked improvement on present law, from the standpoint of business. S. 414 is identical to the earlier Senate-passed bill. We therefore support S. 414, as we supported the bill introduced by Senator Chafee (S. 708) and passed by the Senate in the last Congress.

Discussions last year between members of this committee and the House Committee on Energy and Commerce failed to produce compromise legislation acceptable to both the Senate and the House. However, these discussions produced some useful and constructive compromise proposals and appear to have achieved agreement on how to handle many problems of major concern to industry. The momentum of these discussions should be carried forward, so that we can achieve legislative agreement on a more sensible—yet still effective—law as soon as possible.

Now let me discuss each of these points in more detail.

DETERIORATING TRADE BALANCE INCREASES NEED FOR FCPA REFORM

During congressional hearings in 1981-82, the point was made on several occasions that the U.S. manufactured goods trade balance had markedly improved since 1977, despite implementation of a unilateral FCPA by the United States. These remarks were based on a near-record manufactured goods trade surplus of \$19 billion

in 1980 and a further \$12 billion surplus in 1981. But these surpluses resulted from an "export boom," which itself was the result of a cheap dollar two years earlier and relatively strong demand in foreign markets. Demand for U.S. manufactured exports abroad has dropped steadily since about mid-1981. Our trade surplus in manufactures disappeared altogether in 1982, and was replaced by a \$4 billion deficit, our third since 1970; a worse deficit is expected this year.

Such numbers indicate that long-term U.S. export competitiveness is not improving. And while the Census Bureau reported that manufactured exports created one-third of all new private sector jobs in 1977-80, falling exports clearly deepened the recent domestic economic recession. In short, insofar as FCPA acts as a disincentive to U.S. exports, this disincentive must be reduced as part of our general policy of maximizing U.S. export competitiveness.

I believe that I do not need to repeat all the reasons which were given in previous hearings as to why FCPA discourages exports. It is sufficient to say that all the problems with this law cited by industry witnesses two years ago are still valid. The main thrust of industry's complaint is that FCPA needlessly discourages legitimate export business. This is particularly true of the "reason to know" clause with respect to actions taken by agents. U.S. companies may have to offer an implied insult to an honest and effective local representative—who can usually decide to work for someone else—in order to be absolutely sure that they did not have "reason to know" that payments were used for corrupt purposes. Nor is there yet satisfactory guidance on how far companies have to go to satisfy this "reason to know" standard. This is but one example, though perhaps the outstanding example, of how the uncertainties of the statute cause U.S. companies to fail to pursue export opportunities.

There is one final point which I might add here. In examining testimony offered to this committee on behalf of NAM in 1981, I note the emphasis on the unilateral nature of this law. We emphasized then our belief that the domestically-passed American law was to be complemented by an international agreement to outlaw bribery of government officials in international commercial transactions. At that time, negotiations in the UN toward such an agreement had only recently collapsed. At the Venice economic summit of 1980, the major industrial nations declared their intention of seeking such an agreement among themselves, should the UN effort not be revived. That declaration is nearly three years old, and there have been no serious discussions of any international anti-bribery agreement since—at the UN, within the OECD, or in any other international body. My conclusion, Mr. Chairman, is that the United States will continue to go it alone in this area for the indefinite future.

What this means is that unilateral application of our FCPA to U.S. companies outside the U.S. will not by itself "clean up" the international commercial environment. In a situation where our foreign-based competition may be tacitly encouraged by their governments to use every means possible to secure a contract, it is doubly necessary that our own FCPA is as explicit as possible regarding what is illegal behavior and what is legal.

NAM SUPPORTS S. 414

The legislation introduced in 1981 by Senator Chafee, as subsequently amended and passed by the Senate, marked a major improvement over present law. The Senate-passed version of this bill has now been reintroduced as S. 414, and once again NAM fully supports this legislation.

For the record, I will review briefly the ways in which S. 414 would clarify and improve the law from a business point of view, without weakening the essential principles established in FCPA.

ANTIBRIBERY PROVISION OF FCPA

S. 414 abolishes the "reason to know" standard regarding behavior of agents and other intermediaries, contained in section 104 of the present law. Instead, the new section 104(b) would explicitly prohibit companies from "directing or authorizing" illegal payments "expressly or by a course of conduct." Although there has been some debate over the meaning of the phrase "course of conduct," it seems preferable to present law in that the illegality of corporate behavior would be clearly linked to the intent of company action.

S. 414 further clarifies FCPA by listing other types of transactions made in the ordinary course of business which are not considered bribes. Notably, this includes payments which are considered "lawful under the law and regulations of the foreign official's country."

S. 414 establishes that FCPA is the exclusive remedy under U.S. law for an alleged illegal payment made by a U.S. company to a foreign official abroad. The purpose of this provision is to eliminate the double standard which could be created by application of domestic mail and wire fraud laws, rather than FCPA. If this provision were passed, the businessman would know that the standard by which his actions are judged is set in FCPA, not domestic statutes originally passed for other purposes.

Similarly, S. 414 would eliminate confusion which may presently arise over anti-bribery enforcement by consolidating all enforcement of this part of the law in the Justice Department.

ACCOUNTING PROVISIONS

Let me note at the outset that it is an ironic feature of FCPA which establishes burdensome accounting control and record-keeping requirements for all publicly-owned companies whether or not they do any foreign business. With this in mind, the accounting procedures for all SEC-regulated companies, and reduce a cost overhead that is shared by all.

S. 414 reduces the implied burdens of the expansive requirement of FCPA that companies keep accurate and "reasonably detailed" books and records. S. 414 relates this provision to the purposes of internal accounting controls, specifies that "records" mean accounting records, and subjects this requirement to a cost-benefit test.

S. 414 deletes from FCPA all criminal liability for failure to maintain an effective internal accounting control system. Companies would be subject to civil action for failure to maintain an effective system, but would be allowed the defense that they made a "good faith" effort to do so. Individuals would be subject to civil prosecution for their actions if they caused a company to fail to maintain or devise a control system. Both companies and individuals are subject to prosecution if internal accounting controls are knowingly circumvented. This new approach to limitations on corporate liability would eliminate the risk, under current law, that companies and individuals may be subject to severe penalties when no wrongdoing was intended.

S. 414 establishes that when a U.S. company holds fifty percent or less of the voting power in a foreign subsidiary, the U.S. parent's obligation is only to make a good faith effort to influence the foreign firm to establish an adequate internal accounting control system.

There are the major changes proposed by S. 414 which I feel will help make the law easier to understand and apply in ongoing business transactions.

We want progress to continue toward acceptable legislation approved by both Houses of Congress.

NAM's position at present remains one of full support of S. 414. We are taking this position to indicate that for the NAM and for its member firms, significant reform of FCPA remains a priority item on the congressional agenda.

After Senator Chafee's bill, with several important committee amendments, passed the Senate on a voice vote in November, 1981, NAM was extremely disappointed that no final action was taken by Congress on this issue last year. But considerable progress was made last autumn in trying to achieve a House-Senate compromise bill which would be acceptable to both Houses. To echo Senator Heinz' comments when he introduced S. 414 three weeks ago, We hope that this step will lead to resumption of a constructive House-Senate dialogue, and that significant reform legislation can be passed soon by both Houses. We urge prompt action by the Senate so that sufficient time would be available to work out a satisfactory compromise with the House.

Mr. BLASIER. This is the 10th hearing held in 2 years as a subject that is complex, and seem obscure, but that is of critical importance to the export competitiveness of American industry.

During hearings in 1981 and 1982, the point was made on several occasions that the U.S. manufactured goods trade balance had markedly improved since 1977 despite implementation of a unilateral FCPA by the United States. These remarks were based on a near-record manufactured goods export performance in 1980 and 1981, but our trade surplus in manufactures disappeared altogether in 1982 and was replaced by a deficit. Our even worse deficit is expected this year.

This indicates that long term U.S. export competitiveness has not improved. Insofar as the Foreign Corrupt Practices Act, acts as a disincentive to U.S. exports that disincentive must be reduced as part of our general policy of maximizing U.S. export competitiveness. There is no need to repeat all of the reasons already given in previous hearings as to why the Foreign Corrupt Practices Act discourages imports. Suffice it to say that all of the problems with this law cited by industry witnesses 2 years ago are still valid.

LEGITIMATE EXPORT BUSINESSES DISCOURAGED

The main thrust of industry's complaint is that FCPA needlessly discourages legitimate export business. This is particularly true of the "reason to know" clause with respect to actions taken by agents.

U.S. companies are left to rely on little more than some amorphous smell test, or are put in a position of having to offer an implied insult to an honest and effective local representative, who, by the way, can usually decide to work for someone else, in order to determine whether or not they had reason to know that payments were used for corrupt purposes.

Surely, such an ambiguous standard does little to advance the underlying purposes of the FCPA. We certainly do not condone bribery of foreign officials as a means of obtaining business. However, we feel strongly that any law which seeks to define the boundaries of unlawful conduct should not contain vague and arbitrary provisions which needlessly chill export activities or which significantly increase the accounting cost overhead.

One final point of note. In testimony offered to this committee on behalf of NAM in 1981, we emphasized that the domestically passed American law was supposed to be complemented by an international agreement to outlaw bribery of Government officials in international commercial transactions.

The United States by itself will not clean up the international commercial environment. In a situation where our foreign-based competition may be tacitly encouraged by their governments to use every means possible to secure a contract, it is doubly necessary that our own act be as explicit as possible regarding what behavior is illegal and what is legal.

The legislation introduced in 1981 by Senator Chafee, as subsequently amended and passed on a voice vote by the Senate in November 1981, has now been reintroduced in the form of S. 414, and our prepared statement does go into greater detail on the major beneficial changes contained in the bill.

Rather than go into these changes in detail, let me simply say that for NAM and its member firms, significant reform of the Foreign Corrupt Practices Act continues to be a priority item on the congressional agenda. We are pleased to have this opportunity to add our voice to the many others expressing full support for this bill.

We were disappointed that no final action was taken by the Congress on this issue last year. But at the same time, we recognize that considerable progress was made last fall in reaching a compromise that would be acceptable to both Houses.

To echo Senator Heinz' comments when he recently introduced S.414, we hope this step will lead to the resumption of a constructive House-Senate dialog and significant reform legislation can be passed soon by both Houses.

We would urge prompt action by the Senate so sufficient time will be provided to work out a satisfactory compromise with the House.

Mr. FINCH. If I might on the accounting provisions, the statement I would like to make is simple.

The business community and accounting profession appreciate the work you did in 1981. We support the floor amendment you added, and the amendment you added in committee, and we hope, in any negotiations with the House, that the Senate will prevail.

Thank you.

Senator D'AMATO. Mr. Samuels.

**STATEMENT OF MICHAEL A. SAMUELS, VICE PRESIDENT,
INTERNATIONAL U.S. CHAMBER OF COMMERCE**

Mr. SAMUELS. I am vice-president of the International Chamber of Commerce. I appreciate the opportunity to express the chamber's support for S. 414, which clarifies certain provisions in the Foreign Practices Act of 1977, and is the same bill as S.708, passed by the Senate during the last Congress.

I want to commend Senator Heinz for assuming leadership on this important issue, and express the Chamber's appreciation for Senator Chafee's tireless efforts during the last Congress to obtain FCPA clarification.

I am sorry that Senator Chafee has left his seat on the Banking Committee, but know that we can continue to count on his strong leadership in helping to move this bill through Congress this year.

Mr. Chairman, I will summarize my statement, and ask that the entire text be placed in the record. The text identifies the major features of S. 414 and the reason the chamber supports them.

My summary remarks will focus on the broader reasons why clarifications of the FCPA along the lines of S. 414 is needed.

The chamber believes that Senator Heinz' bill properly frames the objectives of the bill to clarify FCPA, along the lines of S. 414 is needed. The chamber believes that Senator Heinz's bill properly frames the objectives that a bill to clarify the FCPA must accomplish. An effective bill cannot compromise the fundamental objective of introducing "bright-line" standards to guide business standards.

Nevertheless, we believe that continuation of the Senate/House negotiations begun last year can result in a compromise formula for clarification that still satisfies these fundamental objectives. The chamber hopes Senate and House negotiations will move expeditiously, and offers whatever assistance we can to help you.

Clarification of the FCPA is long overdue. Let me be clear on the chamber's position concerning that act. The chamber endorses the 1977 act's objective of achieving the elimination of bribes and extortion aimed at influencing the actions of foreign government officials in connection with business connection opportunities.

AMERICAN BUSINESS WELCOMES COMPETITION

The issue at question is not whether to condone or ignore corrupt practices. The chamber opposes corrupt practices. They do not serve the commercial interests of the American business community. On the contrary, American business does best when what counts is competitiveness and not corruption.

The reason that I am representing the chamber today in support of S. 414 is because certain provisions of the FCPA translate Congress antibribery objectives into statutory language that unnecessarily impairs the international competitive performance of American businesses.

Congress objectives, which the chamber shares, can be achieved without ambiguities that reach beyond these objectives to stifle legitimate entrepreneurship.

Statutory ambiguities make for poor national policies, even in the best of circumstances. But today the U.S. international competitive position is not in the best of circumstances. This year, we face prospects for a merchandise trade deficit of some \$75 billion, and some economists have warned that we could have an unprecedented account deficit of some \$40 billion.

Much of the problem arises from slow growth worldwide and an overvalued dollar. But our international accounts deficits must also remind us that U.S. businesses face formidable challenges from foreign competitors in world markets. At a time when exporting is so important to the economic recovery, and when there are mounting pressures for trade production and retaliation in response to fair and unfair foreign competition, does it make sense to erode our competitive spirit by burdening ourselves with murky statutory language under the FCPA? I think not.

To restore growth in employment to our economy, we need greater incentives to risk-taking and long-term business strategies, not legal ambiguities that signal businessmen to "leave well enough alone." The effect of the FCPA should be to check corruption, not entrepreneurs.

The U.S. Chamber in 1981 published a report on the FCPA that contains case studies that illustrate that the FCPA has had unintended affects that have cost U.S. firms, foreign business opportunities. The report suggests that U.S. firms are disadvantaged because many foreign countries are reluctant to do business with American companies when confronted with the requirements of the FCPA.

From my own experience as a former U.S. Ambassador, and a long-time observer of Third-World affairs, I can say without doubt that the current FCPA is an unwise competitive burden. U.S. companies have lost overseas business because they refuse to be guided by customary local business procedures, which they feared might be questionable under the FCPA. One consequence is that U.S. firms are less likely than European or Japanese competitors to enter the world's fastest growing export market—developing countries.

Finally, until we have a comprehensible national law, we will find it difficult to persuade foreign governments to cooperate in setting multilateral rules on payments. And that should be our goal.

The enactment of Senator Heinz' bill would alleviate considerably the burdens placed on U.S. trade performance by FCPA effects that go beyond Congress antibribery objectives.

S. 414 proposes a responsible means of reaffirming our country's commitment to a high standard of conduct while avoiding unnecessary and unintended checks on U.S. international competitiveness.

The chamber appreciates the subcommittee's interest in holding a hearing on this bill early in the 98th session, and stands ready to work with you for its expeditious enactment.

Thank you.

[Complete statement follows:]

STATEMENT FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES BY MICHAEL A. SAMUELS

I am Michael A. Samuels, Vice President, International, of the Chamber of Commerce of the United States. The Chamber is the largest federation of business and professional organizations in the country, and is the principal spokesman for the American business community.

I appreciate the opportunity to express the Chamber's support for S. 414, the Business Accounting and Foreign Trade Simplification Act, which clarifies certain provisions of the Foreign Corrupt Practices Act (FCPA) of 1977 whose ambiguities discourage U.S. exporting and foreign investment. I want to commend Senator Heinz for assuming leadership on this important issue, and express the Chamber's appreciation for Senator Chafee's tireless efforts during the last Congress to obtain FCPA clarification. S. 414 is the same bill passed during the last Congress by the Senate, as S. 708, largely due to the leadership of Senator Chafee, Senator Heinz, and this distinguished Subcommittee. I am sorry that Senator Chafee has chosen to give up his seat on the Banking Committee, but know that we can continue to count on his strong leadership in helping to move this bill through Congress this year.

The key features of S. 414 are:

1. Substitute an ability to make a clear distinction, or "a bright-line standard," for the FCPA's ambiguous "reason to know" standard governing the liability of U.S. concerns for the conduct of third parties, such as foreign agents. The bill proposes liability when a U.S. concern "directs or authorizes, expressly or by a course of conduct" that an illegal payment be made.
2. Offer clearer and more workable definition of permissible payments in terms of a payment's purpose rather than the post of its recipient.
3. Revise the FCPA accounting provisions by merging the record-keeping requirement into the internal accounting controls requirements and permitting a "cost and benefits" test to apply to accounting methods aimed at achieving the Act's objectives. The bill also clarifies a parent company's liability for the accounts of its subsidiaries.
4. Reduce the risk of double jeopardy by making the Business Practices and Records Act the exclusive statute for enforcement action in connection with illegal foreign payments.
5. Encourage uniform interpretation of the anti-bribery provisions of the FCPA by consolidating anti-bribery enforcement within the Department of Justice. The SEC retains jurisdiction on the accounting provisions.
6. Improve the FCPA business review procedures of the Department of Justice.
7. Stress negotiations for a multilateral anti-bribery agreement and other measures to encourage the conformity of foreign practices to anti-bribery standards.

After thorough hearings and deliberations, the Senate Banking Committee, and then the full Senate, adopted a bill identical in essence to S. 414. Differences between the Senate and key members of the House made it impossible to enact a version of this bill during the last Congress, but negotiations undertaken by Senate and House members and staff late in the session produced considerable progress toward narrowing the differences. The Chamber believes that S. 414, as introduced by Senator Heinz, establishes the right framework for the objectives that a bill to clarify the FCPA must accomplish, and that an effective bill cannot compromise the fundamental objective of introducing bright-line standards to guide business actions. Nevertheless, we believe that continuation of the Senate/House negotiations can result in a formula for clarification that satisfies these fundamental objectives and still allays the concerns of those who remain uncomfortable with the language of S. 414. The

Chamber hopes those Senate and House negotiations will move expeditiously, and offers whatever assistance may be useful.

Clarification of the Foreign Corrupt Practices Act (FCPA) of 1977 is long overdue. Let me be clear on the Chamber's position concerning that Act. The Chamber endorses the 1977 Act's objective of achieving the elimination of bribes and extortion aimed at influencing the actions of foreign government officials in connection with business opportunities. The issue at question is not whether to condone or ignore corrupt practices. The Chamber opposes corrupt practices. They do not serve the Nation's political or economic interests, and they do not serve the commercial interests of the American business community. On the contrary, American business does best when what counts is competitiveness, not corruption.

The reason that I am representing the Chamber here today in support of S. 414 is because certain provisions of the 1977 FCPA translate Congress' anti-bribery objectives into statutory language that unnecessarily impairs the international competitive performance of American businesses. Congress' objectives, which the Chamber shares, can be achieved without ambiguities that reach beyond these objectives to stifle legitimate entrepreneurship. Ambiguities in the Act's language deter American businessmen from overseas investment, not because our businessmen cannot make the kinds of payments Congress sought to banish, but because they are not sure when they might inadvertently transgress vague statutory standards.

Key provisions of the FCPA contain language that is ambiguous and confusing, not only to businessmen, but to lawyers and accountants—those professionals to whom businessmen must turn for guidance on compliance. Neither the FCPA's legislative history nor the policy statements issued by the Securities and Exchange Commission (SEC) and Justice Department have provided adequate guidance for proper conduct under the Act. The record-keeping and internal control provisions use vague language in setting the accounting standards that reporting companies must meet. The anti-bribery provisions of the Act are, perhaps, even more unclear and do not take into consideration the variations in business practices from country to country.

This is poor national policy even in the best of circumstances. But, today the United States' international competitive position is not in the best of circumstances. This year, we face prospects for a merchandise trade deficit of some \$75 billion, and an unprecedented current account deficit of some \$40 billion. Much of the problem arises from slow growth worldwide and an overvalued dollar that raises the foreign price of U.S. products and services. But our international accounts deficits must also remind us that U.S. businesses face formidable challenges from foreign competitors in world markets, and many U.S. sectors are losing world market share. Moreover, we face these competitive challenges at a time when domestic economic growth depends more than ever before on our foreign trade and investment performance. At a time when exporting is so important to economic recovery, and when there are mounting pressures for trade protection and retaliation in response to fair and unfair foreign competition, does it make sense to erode our competitive spirit by burdening ourselves with murky statutory language under the FCPA?

To restore growth and employment to our economy, we need greater incentives to risk-taking and long-term business strategies, not legal ambiguities that signal businessmen to "leave well enough alone." The effect of the FCPA should be to check corruption, not entrepreneurship. Finally, until we have a comprehensible national law, we will find it difficult to persuade foreign governments to cooperate in setting multilateral rules on payments.

The U.S. Chamber in 1981 published a report on the FCPA which contains a collection of case studies that illustrate the FCPA's unintended effects, which have cost U.S. firms foreign business opportunities. The report, entitled *The Price of Ambiguity: More than Three Years Under the Foreign Corrupt Practices Act*, indicates that the FCPA has made U.S. companies wary of engaging in business in some overseas markets. It also suggests that U.S. firms are disadvantaged because many foreign countries are reluctant to do business with American companies when confronted with the requirements of the FCPA. There are numerous instances where foreign customers, agents, and joint-venture partners have ended their business relationships with a U.S. concern because they feared becoming implicated in U.S. Government charges against that U.S. company. Some of the cases illustrate problems that may arise due to U.S. company uncertainty as to the extent of its liability for the actions of third parties, such as foreign agents, minority owners of subsidiaries, and joint-venture partners, over which the U.S. companies may have little or no control.

U.S. companies also have lost overseas business because they refused to be guided by customary local business procedures which they feared might be questionable under the FCPA. A representative list of such practices, included in the Chamber

report, shows that most of these are not within Congress' intended proscription. Many such practices are legal, required by convention, or are considered common courtesy in foreign countries. Failure to conform to them can make business impossible. However, the effect of the FCPA ambiguities has been to encourage U.S. companies to concentrate their activity in geographic regions where there is relatively little risk of running afoul of the FCPA. One consequence is that U.S. firms are less likely than their European or Japanese competitors to enter the world's fastest growing export markets—developing countries.

The enactment of Senator Heinz's bill would alleviate considerably the burdens placed on U.S. trade performance by FCP effects that go beyond Congress' anti-bribery objectives.

First, it changes the ambiguous "reason to know" standard for determining the liability of U.S. concerns for third party actions to a bright-line standard of direction or authorization of an illegal payment, expressedly or by a course of conduct, by a U.S. concern. Under the FCPA today, companies are never sure as to when they should have reason to know that an agent may be acting in violation of the law. Establishment of a bright-line standard that dispels unwarranted business concerns about hypothetical responsibilities to be omniscient of omnipotent is critical reducing the unduly damaging effects of the FCPA on U.S. trade and investment.

Second, the bill reiterates Congress' original recognition that in certain countries making "facilitating" or so-called "grease" payments to foreign officials is necessary to do business. Generally, these payments are customary in the country where made and are intended to expedite the performance of official duties. S. 414 defines these types of payments, which Congress intended to exempt, in terms of their purpose rather than the position of the recipient, i.e., one whose "duties are essentially ministerial or clerical." In many countries, one cannot identify which government positions are "essentially ministerial or clerical." S. 414 adopts a more workable definition based on reasonable assumptions about the purposes of merely facilitating payments versus bribes. For example, S. 414 permits payments lawful under the local law and payments aimed at expediting or securing the performance of routine official action. the "purpose" test establishes clearer rules, and we believe better reflects the original intent of Congress in exempting facilitating payments.

Third, the findings and conclusions of the Heinz bill rightly state: "The accounting standards requirements of the Foreign Corrupt Practices Act of 1977, which apply to all issuers of securities irrespective of whether they have foreign operations, are unclear and excessive and have caused costly and unnecessary paperwork burdens." S. 414 addresses this problem by establishing a single provision requiring a system of internal accounting controls sufficient to provide "reasonable assurances" that the controls would achieve certain desired objectives, such as management accountability and record accuracy. At the same time, it affords businessmen the needed latitude to apply a "costs and benefits" test to controls aimed at satisfying the law's requirements. We understand that Senate and House negotiators on this bill last year considered some other formulas for revising the FCPA accounting provisions. We believe there may be several ways to address the excessive cost and paperwork burden of the present laws, but urge that the thrust of the Heinz bill approach, including setting standards of reasonableness and cost-benefit, be preserved.

S. 414 also seeks to diminish the confusion about a parent company's liability for the accounting practices of its foreign and domestic subsidiaries by setting the practical standard that a parent company which owns 50 per cent or less of the equity capital of a subsidiary must demonstrate "good faith" efforts to influence the subsidiary's compliance with the Act's internal control provisions.

Fourth, the Heinz bill eliminates the concern of business over the multitude of statutes which arguably could be used to prosecute companies for the corrupt payment violations described in the FCPA. Under S. 414 section 104 of the Business Practices and Records Act would be the exclusive provision under U.S. law for prosecuting a U.S. concern for using the mails or other means of interstate commerce to make an improper payment to a foreign official. This provision would eliminate the possibility that a U.S. government enforcement agency could prosecute a concern for bribery violations under one statute after that concern had been acquitted or given official approval for the same conduct under another statute by the same or another enforcement agency. This would also eliminate the threat perceived by U.S. business of having other criminal statutes (e.g., the wire fraud provision) stretched to reach conduct not proscribed by the FCPA.

Fifth, the Heinz bill would consolidate under the Justice Department enforcement of the law's anti-bribery provisions, thereby improving the administration of these

provisions through single-source interpretation. The SEC would retain jurisdiction over the accounting provision, as provided under current law.

Sixth, S. 414 would provide for more expeditious and useful guidance to the business community through the Department of Justice's Business Review Procedure. It would also assure more confidential treatment and limited use of materials and documents submitted by companies as part of the review process, thereby eliminating the concern of U.S. businesses that their submissions to the Department of Justice could become a source of information for other prosecutorial action.

Finally, S. 414 recognizes that only multilateral strictures on corruption can effectively check corrupt practices international business. Accordingly, it calls on the President to pursue negotiations and report to Congress on progress made within a year of the bill's enactment. It also asks the President to recommend actions that the U.S. could take to promote foreign cooperation, as well as actions the U.S. should consider in the absence of progress on an international agreement. The Chamber believes that U.S. business should set a high standard of conduct. But we should not permit our foreign competitors to capitalize on unilateral U.S. self-sanction, at the expense of U.S. growth and jobs. We must seek new ways to achieve enforceable multilateral rules against bribery. And we should not permit foreign governments the excuse of vague, unworkable U.S. laws to justify their non-cooperation.

Clairification of FCPA as proposed in S. 414 is urgent. S. 414 proposes a responsible means of reaffirming our country's commitment to a high standard of conduct, while avoiding unnecessary and unintended checks on U.S. international competitiveness. The Chamber appreciates the Subcommittee's interest in holding a hearing on this bill early in the 98th Session, and stand ready to work with you for its expeditious enactment.

Senator D'AMATO. Senator Lautenberg.

Senator LAUTENBERG. Thank you, Mr. Chairman.

Here I sit on the other side of a panel comprised of businessmen, asking questions about the area I just left.

I sense that perhaps it is assumed that I am an adversary on this. Please don't make any assumptions.

MERCHANDISE TRADE DEFICIT

Mr. Samuels, you talk about a merchandise trade balance. I think also Mr. Blasier described that. Can you quantify that for me again, please?

Mr. SAMUELS. Current estimates are that the likely merchandise trade deficit for this year could reach \$75 billion. Of course with the change in oil prices and what that does to the oil import bill, it is hard to predict now what it will be.

But a fall in oil prices would be an important factor helping to reduce the deficit.

Senator LAUTENBERG. Is it fair to say that our merchandise exports would not be impaired as much if we include, let's say, services; and I don't know whether we do.

And if we exclude the oil imports, we are not looking at that much of a decline, are we, in terms of our position vis-a-vis 2 years ago, taking into the general decline in the world economy?

Mr. SAMUELS. You put, if you are taking into accounts, there, it's hard to say. The \$75 million projection concerns just the merchandise trade deficit, which does exclude services. That is a merchandise trade deficit that would double from a year ago. However the merchandise trade deficit does include commodities such as oil, and therefore would be positively affected by a fall in oil prices. But setting aside oil, we would have significantly worse merchandise trade deficits.

Senator LAUTENBERG. Do me a favor, just to be sure that I am in tune with you in terms of vocabulary. The definition in merchandise trade.

Mr. SAMUELS. Goods.

Senator LAUTENBERG. Not service. Nor does that get compared in deficit calculations to oil imports?

Mr. SAMUELS. Oil imports are part of the goods transactions. There is a measure called current account balance which includes trade in "invisibles," Invisibles includes services, and part of that is returns on investment from abroad. The current account also includes other transfer payments.

We expect that this year we will have one of our worst results on the current accounts balance. As I said, some economists have predicted as much as a \$40 billion deficit, through this figure would be reduced if oil prices fall significantly.

Senator LAUTENBERG. Are we standing alone on this as an international trading country? Are we worse than others resulting from the general change in working conditions, or are we kind of part of the tide here?

What I'm trying to separate out from my——

Mr. SAMUELS. In world trade, as a whole deficits and surpluses must balance. Therefore some countries run surpluses and others run deficits.

We are projecting a significant deficit for us in 1983.

Senator LAUTENBERG. But the positives are being picked up essentially by all exporters; are they not?

Mr. SAMUELS. Not exclusively. The Japanese are running a surplus.

Senator LAUTENBERG. Where else?

Mr. SAMUELS. The Europeans are running deficits on the whole.

Senator LAUTENBERG. Sure they have, and we include it.

Mr. SAMUELS. Some of the developing countries in Southeast Asia have some surpluses.

Senator LAUTENBERG. Relatively minor, I think. Again, other than oil exports. I'm just trying to get a handle on this. Forgive me for slowing down the process. But I want to be sure.

Mr. Finch, did you want to say something?

Mr. FINCH. Mr. Chairman and Senator Lautenberg, if you wish, NAM has just put out a booklet going into this question in detail.

We would be happy to provide it for the record.

Mr. D'AMATO. If the Senator would yield, I think the point of clarification; it might be helpful, not only to this committee, but so that we can all have a better perspective on the problem, if there is a body of fact that could be made available indicating the size of the trade balance exclusive of service and oil.

The question really comes down to how badly our trade balance has been impacted after factoring out oil.

Senator LAUTENBERG. That is what I would like to get to.

Mr. D'AMATO. I think that information should be obtainable.

INCREASE IN SERVICE EXPORTS

Senator LAUTENBERG. It is true, is it not, gentlemen, whoever chooses to answer that, that the services exports have increased substantially?

Mr. SAMUELS. That is true.

Senator LAUTENBERG. So there is a of change in product and in value of product that is taking place, as well as the raw statistic that we are looking at.

And again, my purpose is to try and understand what kind of an impediment the law as it presently stands has been; or, as is discussed so often, has it not been as bad as some would like to think it is?

Mr. SAMUELS. Some of these things are very hard to quantify, Senator. One of the effects of the fuzzy language of the law is to inhibit companies like Mr. Subak's from even going into certain markets, and it is hard to prove that business lost when there was not business tried because of chilling statutory language.

One of the things we are hoping to do is to see to it that the United States has a clear body of law, rather than a fuzzy body of law.

Senator LAUTENBERG. I agree.

Thank you, Mr. Chairman. We will get that information down, please.

[The booklet referred to follows:]

U.S. Trade: Record of the 1970s—Challenge of the 1980s

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Introduction

Achievement of long-term goals of healthy economic growth and full employment cannot be accomplished without improved U.S. international competitiveness. International competitiveness in this context means the ability of our producers to compete in both domestic and world markets. A restoration of U.S. competitiveness in manufactured goods means more jobs in an economy that may be plagued with low growth throughout the 1980s. Finally, U.S. political and economic leadership of free world nations will be decidedly enhanced by demonstrable improvement in U.S. economic performance.

The U.S. Has Lost Its Competitive Edge

By the 1970s, the United States had lost the economic edge which it had held over the rest of the world since 1945. The "catching up" of our foreign competitors forced the end of the Bretton Woods par value system and caused the devaluation of the dollar in 1971. But the new floating exchange-rate system did not restore American trade competitiveness in the 1970s. Other industrial countries, notably Japan, have continued to improve their trade competitiveness relative to the United States. The high price of imported energy in the 1970s placed a new premium on making manufactured exports even more competitive. Japan, certain developing countries, and to some extent Germany met this challenge, but the United States did not.

In 1979 and 1980, the United States enjoyed a boom in manufactured exports. Exports increased at a rate of 23 percent per year, and in 1980 the U.S. manufactured goods surplus hit a near record of \$19 billion. Some thought that the U.S. had turned the corner on trade competitiveness. But the surplus of 1980 did not signal a return to competitiveness. Rather, it was only the traditional short-term result of the depreciation of the dollar in 1977-78, bolstered by relatively strong demand in some foreign markets. Since 1980, our manufactured exports have tended to fall or grow very slowly, while imports have grown at a faster pace—and in 1982 we had a trade deficit in manufactured goods.

Now we face the difficult task of achieving the goal of regaining trade competitiveness which we failed to attain in the 1970s. This is doubly difficult for a number of reasons:

- Demand in foreign markets is low and world-wide recession presents dubious prospects for improvement in the short or medium term. World trade, which has grown steadily since World War II and provided demand for American exports in both developed and developing countries, has, according to GATT statistics, stopped growing. This has affected even Japan's export growth rate and may bring about changes in Japanese economic policy that are difficult to foresee.
- American producers selling in both domestic and overseas markets are penalized by the high value of the dollar and the undervaluation of other currencies, especially the yen, which does not reflect relative costs of production. The yen is selling at nearly the same rate as in 1973, even though productivity in Japan has increased four times as fast as in the United States, while Japanese inflation as expressed in export prices has been only 40 percent of the U.S. rate. A recent report by the New York Federal Reserve Bank estimates that by the end of 1983 the overvaluation of the dollar may reduce our annual gross national product growth by 1 to 1.5 percent.

The Task for the 1980s

We have learned that it is difficult enough to deal with the consequences of economic interdependence in good times. We have yet to learn how to work together to overcome the intensified strains placed on the world trading system and the international monetary system in the midst of bad times,

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when the world scene is characterized by economic recession or very slow growth. We seem to be particularly hard pressed to contain the ever more pronounced manifestations of economic nationalism that characterize the policies of important countries.

We are, therefore, keenly aware of the importance of maintaining an open, market-oriented international trading system, one that establishes agreed-upon norms for commercial conduct among nations and mechanisms for enforcing them. The system, of course, should be fair and not unduly influence the distribution of trade benefits among the participants. Further, the international monetary system must be made to function more effectively in expressing through exchange rate relationships the real changes in competitiveness among countries, if the GATT system is to survive and prosper.

Growth + Exports = Jobs

Asserting that improved competitiveness means more jobs is not a purely hypothetical proposition. The Census Bureau has recently reported that in 1977-80, nearly 30 percent of the net increase in private sector employment was due to manufactured exports. On the other hand, thousands of American jobs in individual industries have been lost due to increased import penetration and the loss of world market shares by U.S. exports, as is shown in Part III of this booklet. Nor have such losses affected only older industries facing inevitable adjustment and re-structuring. This report shows that many high technology industries, especially in the electronics industry product groups, are meeting tough competition at home and abroad.

The answer to this problem is not protectionism as embodied in recent "domestic content" proposals placed before Congress. Protectionist policies endanger our place in the world export markets, delay necessary adjustment in our industrial economy and ultimately are self-defeating in encouraging wrong market responses to rapidly changing conditions of international competition. The answer lies in political recognition of the basic need of our economy to become and remain internationally competitive—and consequently to formulate and carry out an integrated policy to achieve this high-priority national objective. Resumption of non-inflationary growth in the U.S. economy is, of course, essential to improved U.S. trade performance, as well as economic well-being in more general terms. But policies designed to achieve resumption of non-inflationary growth in the United States cannot be based in a purely national context. Certainly the U.S. cannot sustain itself if the rest of the world remains in an economic slump. Coordinated national and international policy actions are clearly required—such as exchange rates, the debt problems of developing world and the GATT system of open world trade.

The long-term economic future for this country is bright, if we can find appropriate solutions for the problems that we face in the 1980s. The United States must, of course, make more certain that we have the educated workforce, the technological knowledge and the infrastructure required to compete in the international economic environment of the 1990s. It is therefore all the more important to learn why we find ourselves in our current unsatisfactory international economic position so that we have a sound basis for making the critical decisions of the 1980s.

Lawrence A. Fox

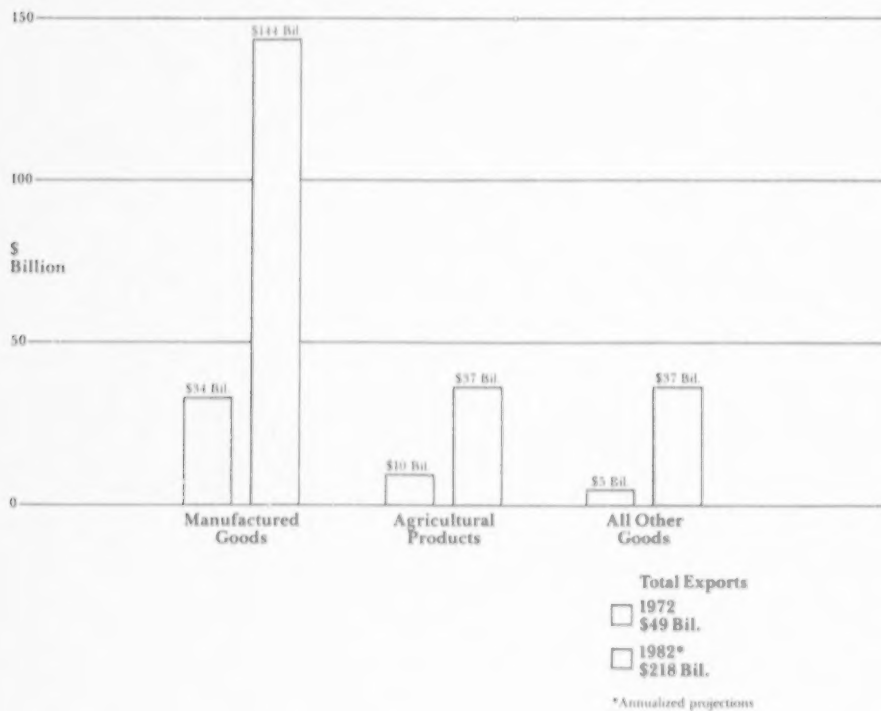
Lawrence A. Fox
Vice President
International Economic Affairs

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**Manufactured exports are the key element
in overall export growth.**

Figure 1. Growth of U.S. Exports by Sector



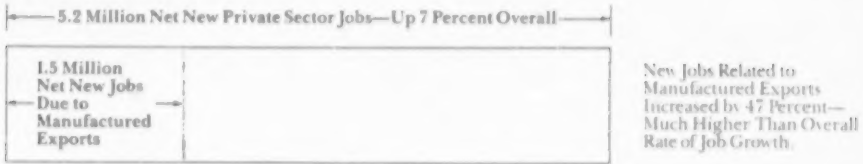
Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade*

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Manufactured exports create jobs—30 percent of the net private sector job increase from 1977 to 1980 resulted from U.S. manufactured exports.

Figure 2: New Jobs Created by Manufactured Exports



Where the Export Jobs Are—How Many Jobs Are Tied to Exports of Manufactures

Industry	% Jobs	Change from 1977
Chemicals and Plastics	19	+5
Machinery	22	+4
Electronics	18	+4
Transportation Equipment	18	+4

Source: U.S. Department of Commerce, 1980 Annual Survey of Manufactures: Origin of Exports of Manufactured Products

Manufactured exports are by far the largest income earner for the U.S. balance of payments. Manufacturing and petroleum firms also contribute most of the direct investment surplus.

Figure 3: Major Items in 1981 U.S. Balance of Payments

Merchandise Trade

U.S. Exports	(Manufactures = 65%)
	\$236 Btl.
U.S. Imports	
	\$264 Btl.

Direct Investment

Income From Abroad	
	\$32 Btl. (41% = Petroleum, 26% = Manufactures, 33% = Other)
Payments to Foreign Companies in U.S.	
	\$8 Btl.

Other Investment

U.S. Income	
	\$54 Btl.
U.S. Payments	
	\$45 Btl.

Travel and Fares

U.S. Income	
	\$16 Btl.
U.S. Payments	
	\$13 Btl.

**Total 1981 U.S.
Balance of Payments
Surplus = \$4.5 Billion**

Other Services, Including Shipping

U.S. Income	
	\$18 Btl.
U.S. Payments	
	\$13 Btl.

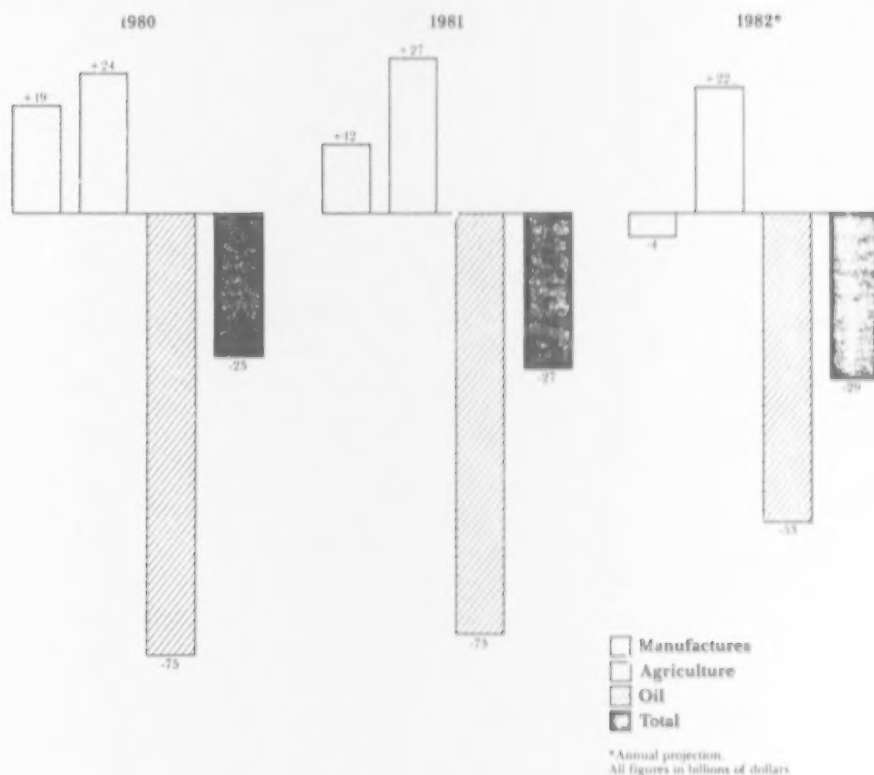
Government and Military Accounts

U.S. Income	
	\$10 Btl.
U.S. Payments	
	\$13 Btl.

Source: U.S. Department of Commerce, *Survey of Current Business*

Manufactures trade determines direction of total U.S. trade account. Since 1980, poorer performance in manufactures has wiped out savings on imported oil of over \$20 billion.

Figure 4: Principal Components of U.S. Trade Balance

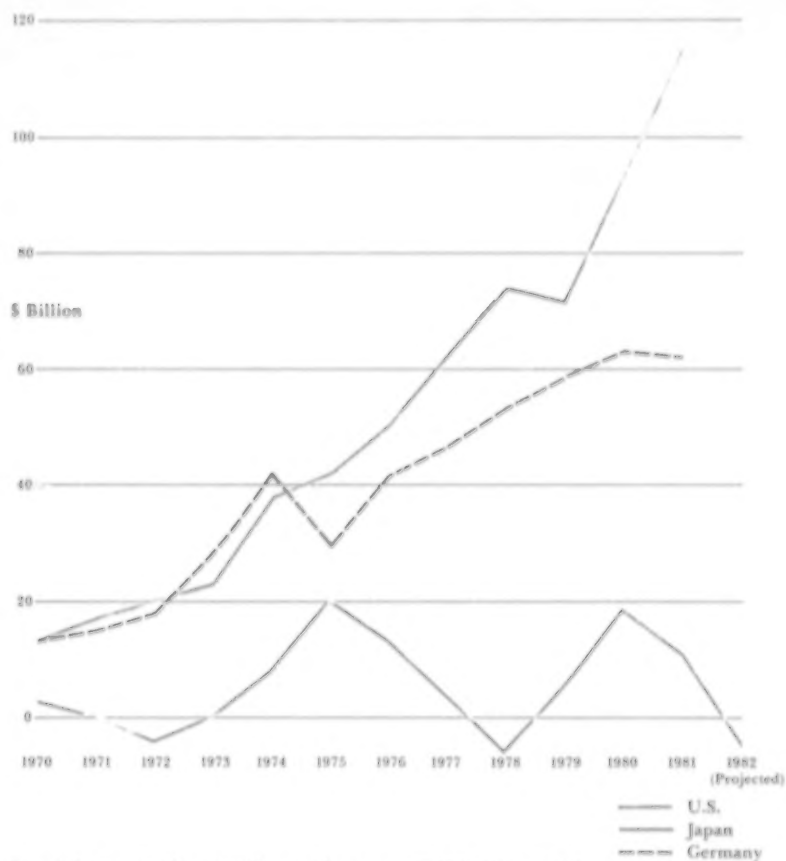


Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade* (For details of annual U.S. trade balances, see Appendix I.)

U.S. manufactures trade balance since 1970 has fluctuated between surplus and deficit. Japan and Germany have built growing surpluses to support their economies.

**II.
U.S. Industry Is
Losing Its International
Competitiveness**

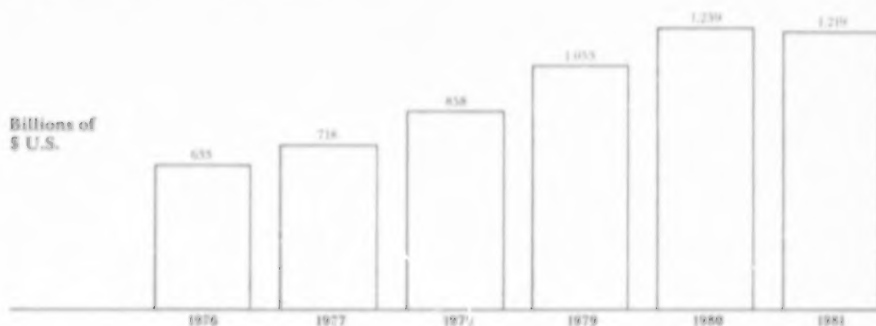
Figure 5: U.S., Japanese and German Manufactured Goods Trade Balances



Source: U.S. Department of Commerce, *International Economic Indicators* (for details of annual U.S. manufactured imports and exports, see Appendix I).

World trade has stopped growing in the 1980s, making it even more difficult for U.S. exports to regain lost market shares.

Figure 6: Total World Exports, 1976-81



Source: International Monetary Fund, *Direction of Trade Statistics*

U.S. exports as a share of industrial production have nearly doubled in 10 years to over 20 percent. But, unlike the situation in Japan and Germany, import levels are nearly as high as exports.

Figure 7: Manufactured Exports and Imports as Shares of Total Manufacturing Production

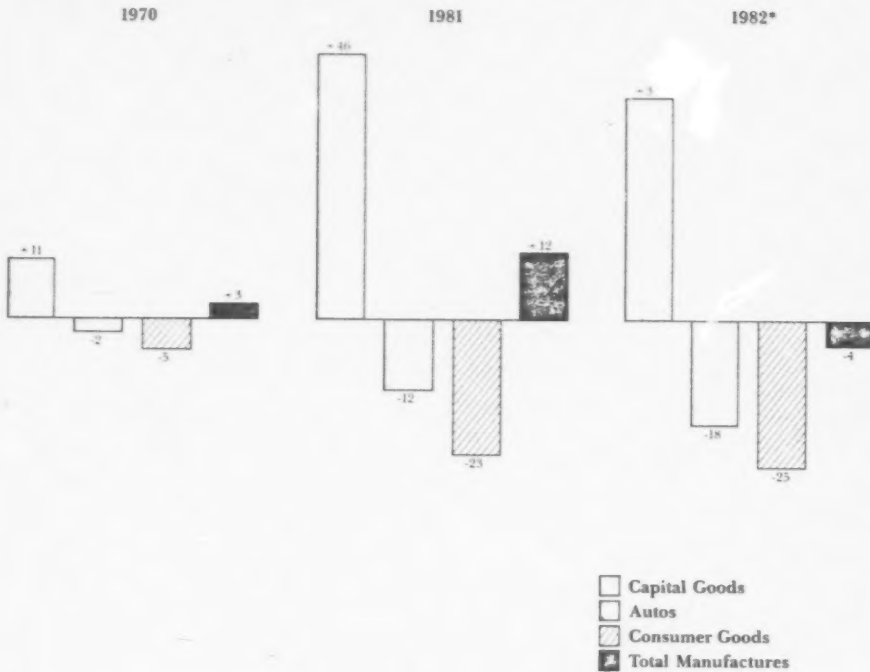


*Based on estimates of manufacturing output (see Technical Notes)

Sources: Organization for Economic Cooperation and Development (OECD), *National Accounts*; U.S. Department of Commerce, *International Economic Indicators*.

U.S. trade surplus in capital goods has covered deficit in automotive and consumer goods. But growth of capital goods imports and decline in exports eliminated 1982 manufactures surplus.

Figure 8: Major Sectoral Balances in Manufactures Trade

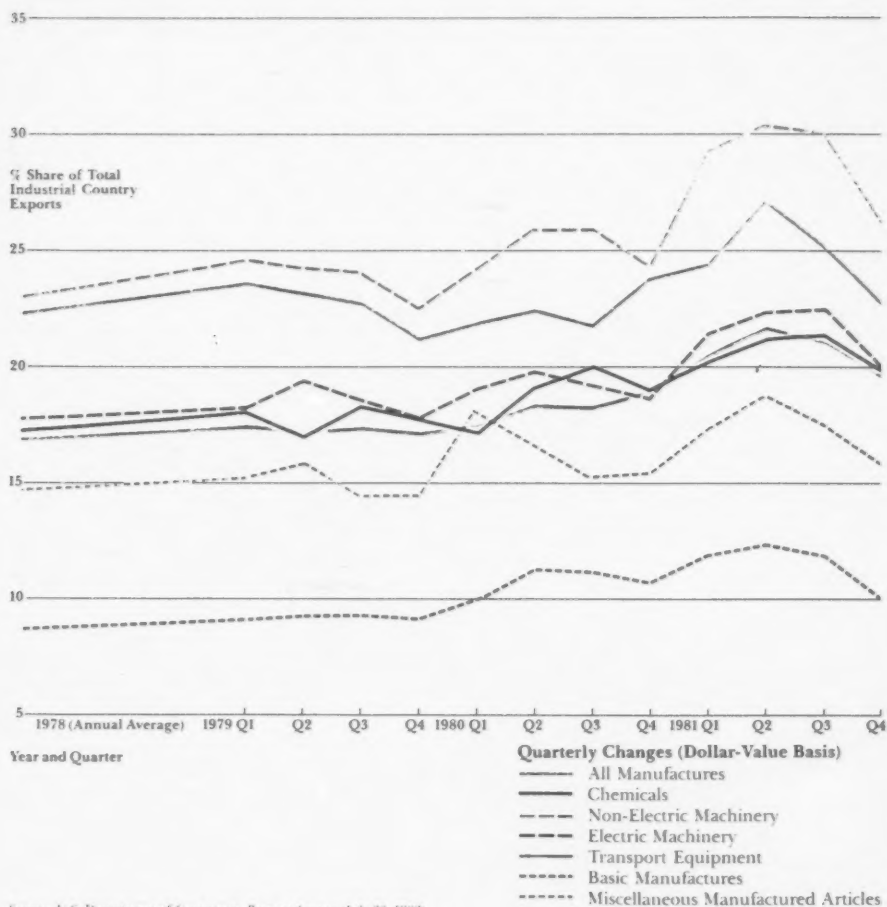


*Annualized projection.
 Total balance includes other sectoral items. All figures in billions of dollars.

Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade* (For details of imports and exports by sector, see Appendix 2.)

Both volume and value of exports have steadily declined since mid-1981, leading to loss of market shares by U.S. producers.

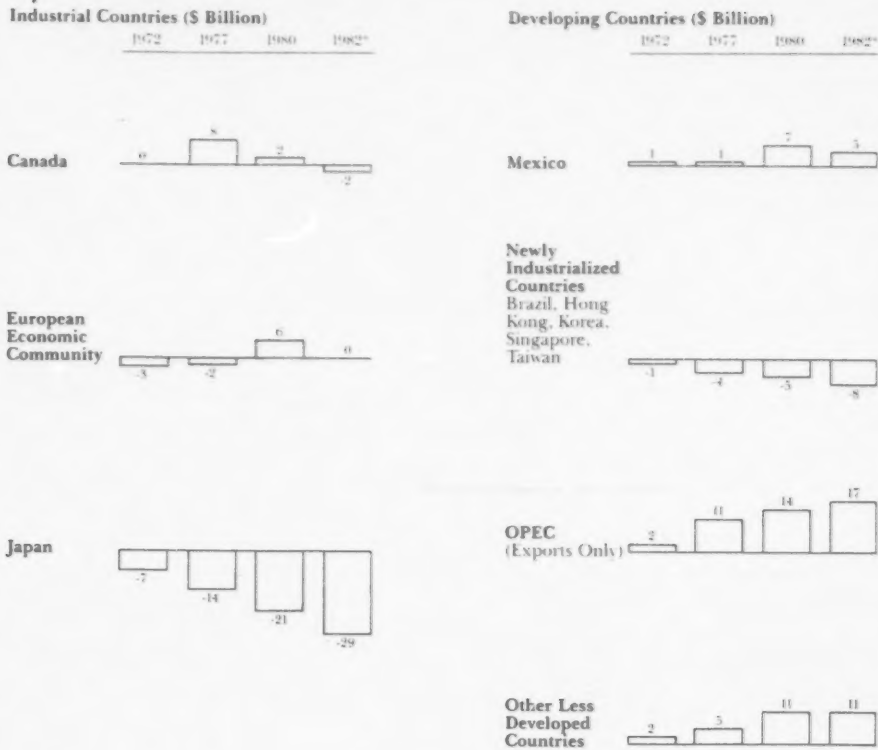
Figure 9: U.S. Share of Industrial Country Manufactured Exports, 1978-81



Source: U.S. Department of Commerce, *Business America* (July 26, 1982)

U.S. manufactures trade balance has worsened with virtually all major partners since 1980.

Figure 10: U.S. Manufactures Trade Balances With Major Trading Partners

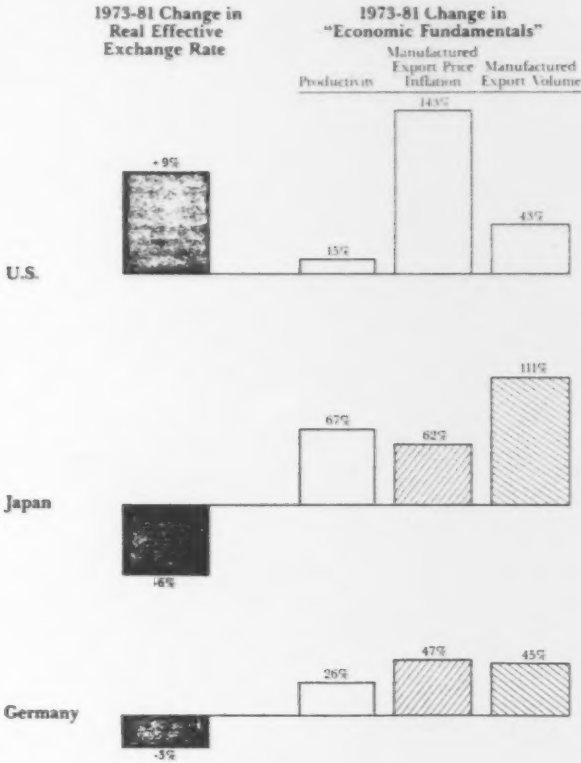


*Annualized rate.

Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade*, and annual reports, *U.S. Exports and U.S. Imports*

World exchange rates have moved opposite to direction indicated by changes in economic fundamentals, penalizing U.S. manufacturers in both domestic and world markets.

Figure 11: Comparison of Morgan Guaranty Real Effective Exchange Rate Index With International Competitiveness Indicators, 1973-1981



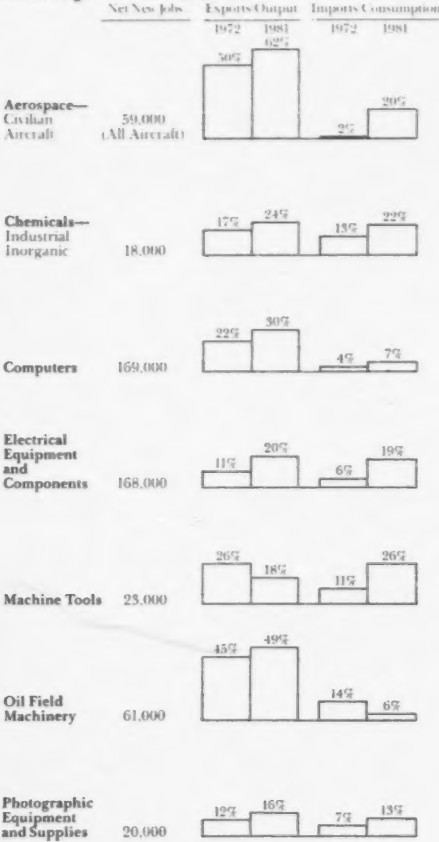
Sources: Morgan Guaranty, *World Financial Markets* (October 1982)
 United Nations, *Monthly Bulletin of Statistics*
 U.S. Department of Commerce, *International Economic Indicators*

More exports have helped some industries create new jobs—but even most successful exporters have faced tougher competition at home from imports.

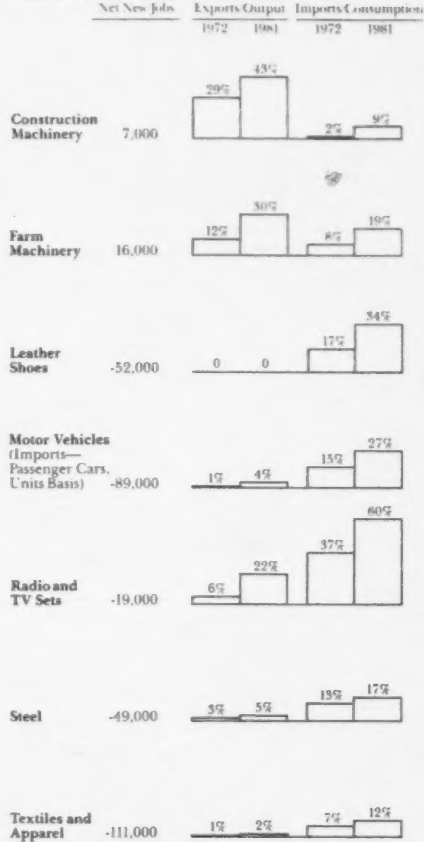
III. Even the Most Competitive Industries Face Tough Competition in the 1980s

Figure 12: Exports, Imports and Growth by Industrial Product Groups

Some High-Growth Industries



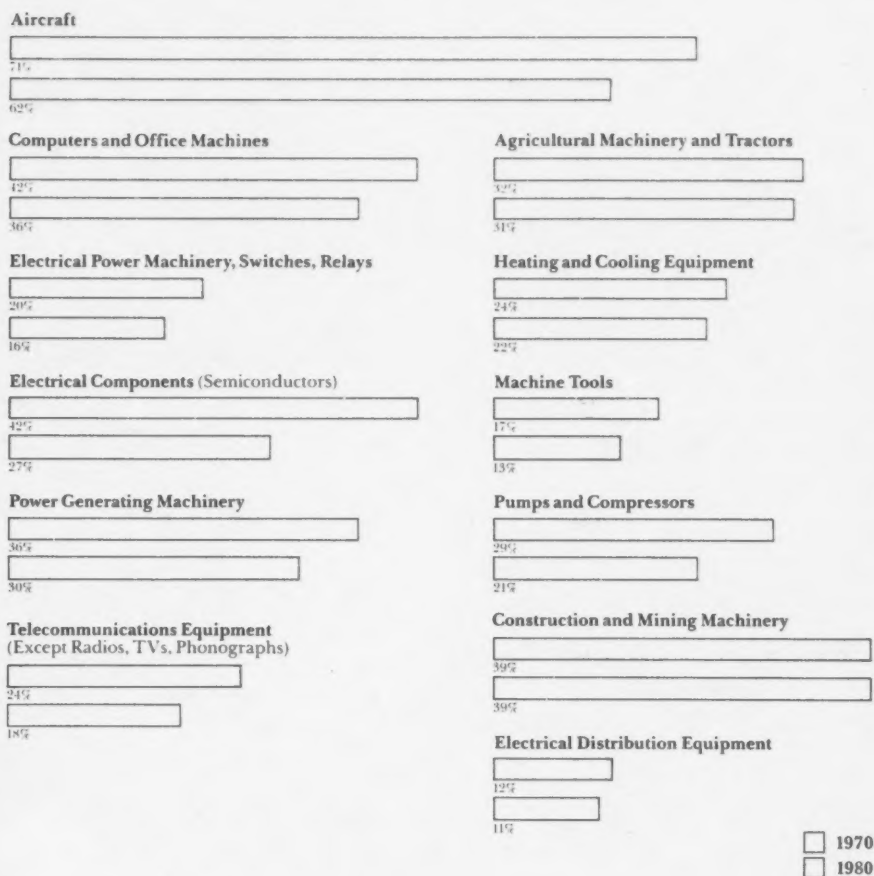
Medium or Low-Growth Industries



Source: U.S. Department of Commerce, 1982 U.S. Industrial Outlook

Many important U.S. capital goods industries have lost shares of the world export market—none has made major gains in the last decade.

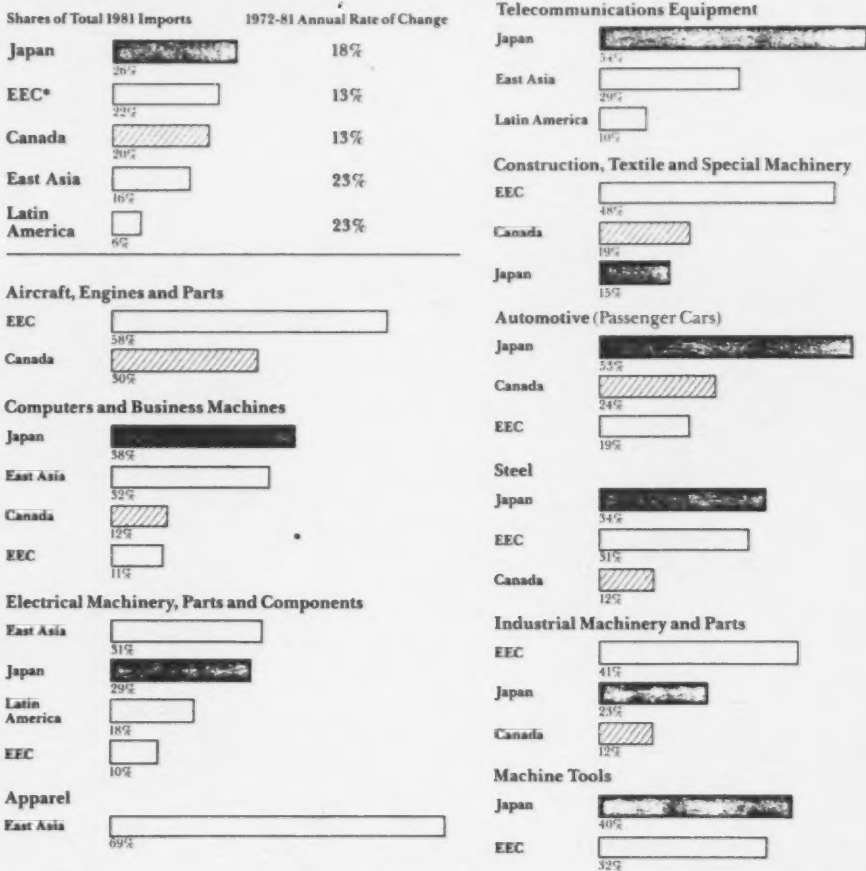
Figure 13: U.S. Shares of Industrial Country Exports to World Market, 1970-80



Source: OECD, *Foreign Trade*, Series C.

Japan has the largest share of the U.S. import market, and a higher growth rate of import penetration than other industrial countries. East Asian countries are also becoming important sources of U.S. manufactured exports.

Figure 14: Sources of U.S. Manufactured Imports

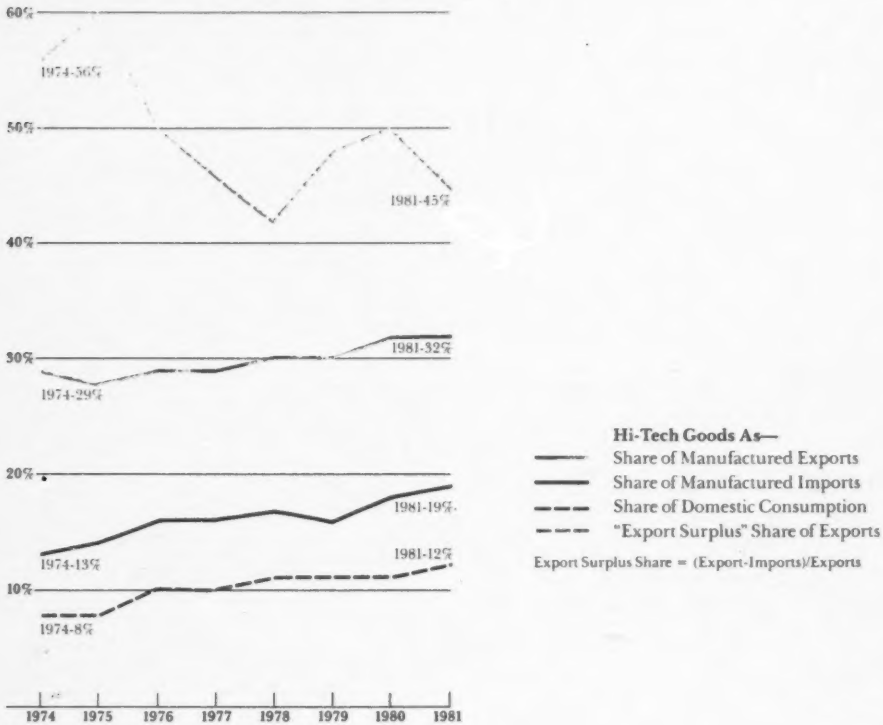


Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade*

*European Economic Community

Will high-technology industries help us through the 1980s and point us in the right direction for the 1990s? High-tech exports have grown rapidly, but so have imports—and in many cases U.S. producers have lost shares of the world market.

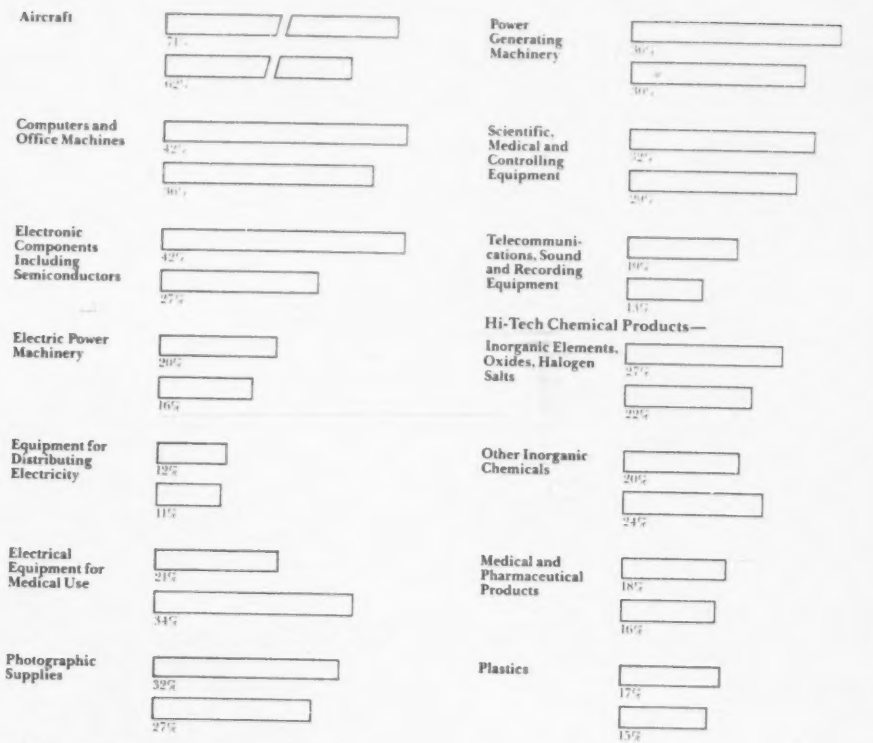
Figure 15: U.S. Commerce Department Reports Overall Loss of Competitiveness in Key Hi-Tech Fields, 1974-81



Source: U.S. Department of Commerce, *Business America* (October 18, 1982)

Virtually all U.S. high-tech exports lost market shares in the 1970s.

Figure 16: Market Shares of U.S. High Technology Exports, 1970-80



- Gross yen-dollar misalignment will reduce U.S. market shares in 1980s unless corrected.
- NAM has undertaken more detailed analysis of U.S. high technology competitiveness.

□ 1970
□ 1980

Sources: U.S. Department of Labor, *Trends in Technology-Intensive Trade* (1980); OECD, *Foreign Trade*, Series C.

Technical Notes

General Note: In all tables, U.S. imports are counted on a "free alongside ship" or customs value basis.

Figure 1. 1982 projection based on nine months' data. Manufactured goods and agricultural products as defined by U.S. Department of Commerce.

Figure 2. "Export-related" jobs are as defined by Census Bureau in the *Annual Survey of Manufacturers*. This definition includes both the direct production of manufactured exports, and jobs in related supplier industries and services.

Figure 3. Balance of payments defined as U.S. balance of payments on current account. Manufactures share of exports is approximate, since the figure for manufactured exports is counted somewhat differently from the overall balance of payments merchandise export figure. "Direct investment income" includes earnings reinvested abroad.

Figure 5. 1982 projections on same basis as Figure 1.

Figure 6. Nominal current-dollar value of world exports, as reported each month by the International Monetary Fund.

Figure 7. Manufacturing production is defined as manufacturing sector of gross domestic product. Japanese figures for 1981 are based on national industrial production and price indices, as reported by OECD.

Figure 8. 1982 projection on same basis as Figure 1. Sectoral totals are based on Commerce Department trade statistics "end use" definition. The sectoral figures do not include certain basic manufactured goods (chemicals, steel, textiles) which are categorized with raw materials (such as oil) as "industrial supplies and materials," but these basic manufactures are included in the total manufactures trade balances in Figure 8. Excluding petroleum, the projected 1982 U.S. trade surplus in industrial supplies and materials is about \$4.2 billion, down by over \$2 billion dollars from 1981.

Figure 9. According to Commerce Department source given in Figure 9, the rise in U.S. share in earlier part of 1981 is due chiefly to short-term statistical effect of rapid dollar appreciation.

Figure 10. 1982 projections based on eight months' data.

Figure 11. Morgan Guaranty "real effective exchange rate" index is trade-weighted and adjusted according to domestic wholesale price inflation. (For full explanation, see *World Financial Markets*, May 1978.) Export price inflation is defined in terms of national currency value. Productivity is defined as manufacturing output per hour worked.

Figure 12. Output is defined as value of product shipments. Consumption is based on *Industrial Outlook* definition of "apparent domestic consumption": product shipments minus exports, plus imports. 1981 data taken from *Industrial Outlook* annual estimates.

Figure 13. 1980 is latest year for which complete OECD data is available. Total world exports do not include exports to the U.S., for purposes of this table. Product groups are defined to allow for the 1978 revision in the Standard International Trade Classification (SITC).

Figure 14. Latin America is defined as Commerce Department regional category "20 Latin American republics." East Asia is defined as Commerce Department residual Asian category, i.e., excluding Japan, South Asia and Communist countries. Nearly all manufactured imports from this residual group originate in four major newly industrializing countries: Korea, Taiwan, Hong Kong, Singapore.

Figure 15. High technology goods defined as 10 product categories listed in *Business America* article. These 10 product groups "account for over 51 percent of total R & D embodied in U.S. manufactures, as well as nearly 60 percent of the direct R & D expenditures." Import penetration defined as in Figure 12: imports as percentage of apparent domestic consumption. "Export surplus" shows strength of exports *net of imports*. Figure 15 indicates that while "hi tech" exports are growing as a share of total exports, hi tech imports into the U.S. are increasing relative to U.S. hi tech exports.

Figure 16. See note for Figure 13 regarding OECD data. High technology categories (based on SITC trade classification) are taken from a 1980 Labor Department study given in source note. Road motor vehicles and domestic electrical appliances, which are not generally considered high technology products, are dropped from the Labor Department list, and electronic components have been added. Also excluded are two other categories (explosives and watches) in which U.S. exports are low in value.

Appendix 1

U.S. Trade Balances—Manufactures and Total Trade, 1970-82

Year	Manufactures Trade			Total Trade		
	Exports	Imports (f.a.s.)	Balance	Exports	Imports (f.a.s.)	Balance
1970	\$ 29.3 bil.	\$ 25.9 bil.	\$ 3.4 bil.	\$ 42.7 bil.	\$ 40.4 bil.	\$ 2.3 bil.
1971	30.4	30.4	0.0	43.6	45.8	-2.2
1972	33.8	37.8	-4.0	49.2	55.9	-6.7
1973	44.7	45.0	-0.3	70.9	69.8	1.1
1974	63.5	55.2	8.3	98.0	100.6	-2.6
1975	71.0	51.1	19.9	107.6	96.6	11.0
1976	77.2	64.8	12.4	115.2	123.5	-8.3
1977	80.2	76.6	3.6	121.2	150.4	-29.2
1978	94.5	100.3	-5.8	143.7	174.8	-31.1
1979	116.7	112.2	4.5	181.9	209.5	-27.6
1980	144.0	125.1	18.9	220.6	245.3	-24.7
1981	154.3	142.5	11.8	233.7	261.0	-27.3
1982	143.7	147.3	-3.6	218.4	246.9	-28.5
(annual rate)						

Sources: U.S. Department of Commerce, *International Economic Indicators and Highlights of U.S. Export and Import Trade*

Appendix 2
U.S. Trade by Manufactured Goods Sectors, 1970-82
(Classification by "End-Use" Categories)

	Capital Goods			Automotive Products			Consumer Goods (Except Foods and Autos)			Industrial Supplies and Materials (Except Petroleum)		
	Exports	Imports	Bal.	Exports	Imports	Bal.	Exports	Imports	Bal.	Exports	Imports	Bal.
1970	14.4	3.8	10.6	3.7	6.0	-2.3	2.7	7.6	-4.9	13.3	12.3	1.0
1977	39.0	13.4	25.6	12.1	18.7	-6.6	8.8	22.4	-13.6	32.2	34.2	-2.0
1980	72.6	29.6	43.0	15.9	27.1	-11.2	16.2	34.4	-18.2	67.7	52.2	15.5
1981	80.2	34.5	45.7	18.0	29.7	-11.7	15.8	38.7	-22.9	64.0	57.5	6.5
1982 (annual rate)	74.6	35.9	38.7	17.4	35.0	-17.6	14.5	39.8	-25.3	56.8	52.6	4.2

All figures in billions of dollars. Imports f.a.s. or customs value (1982).

Source: U.S. Department of Commerce, *Highlights of U.S. Export and Import Trade*

Mr. D'AMATO. I am not going to bother questioning you on S. 414; as to whether the legislative initiative is as important as a year ago, or whether there is a significant possibility of business improvement if S.414 is passed.

Obviously by your presence here, by your testimony, you feel strongly about this matter and support amendments to the Foreign Corrupt Practices Act.

I share with you a thought that I do not believe that anyone can really quantify or qualify to any degree of accuracy how much business has been lost or would have been gained, were it not for the FCPA.

I think it is a lot of conjecture. I agree with Senator Lautenberg that we should not focus only on whether or not it is \$1 billion, \$2 billion, \$3 billion, "the FCPA has contributed significantly to that." They may or may not have.

CONDUCT BUSINESS WITHOUT FEAR OF CRIMINAL PROSECUTION

I think that is irrelevant. I think businessmen are entitled to a clear standard of law; that's what's important. I think we do ourselves a great disservice—I think Senator Proxmire is right when he says that you guys cannot point with any degree of accuracy to a loss of billions of dollars of trade and attribute it to the FCPA. Again, you are businessmen, you are out there and you deserve from Congress, a clear, specific definition of the law so that you can conduct your business in an honest manner without fear of criminal prosecution.

The U.S. Chamber of Commerce has come forth and indicated very succinctly and clearly that you do not countenance bribes—no one here countenances bribes, I agree that the current reason-to-know test leaves something to be desired.

You have a right to say "Come on now, spell it out." And I think Mr. Rose in his testimony before, when he answered one of the questions with respect to whether or not someone said a corporate executive had said go out and get it boys, do it, whether that indeed would be a violation because the executive did not specifically authorize the conduct.

I think primary the priorities should be for us to attempt to ameliorate the current law, to remove the ambiguities that exist in S. 414 and to allow our businessmen to operate their businesses.

I do not think it requires major revisions. I think we made a good start last year in passing S. 708, the clarifying amendments to the FPCA.

I would just leave you with the sense that I think it is important that we do that. We should not be in the business of saying how much it does or does not hurt. We should be in the business of saying, Can we give to our constituents, to the business community, clear definitions that distinctly spell out what will be a violation, what will not be tolerated, and thereby leave them to conduct their businesses in a legal, lawful manner. We must also designate to the proper legal authorities with respect to prosecution—what conduct is and is not permitted.

I think if we can do that, whether it be the Justice Department or the SEC, we must move in that direction.

Again, there is no language that is sacrosanct. I am willing to work out a compromise again with Senator Proxmire. When someone is willing to compromise on legislation that he has authored, I think that is a tremendous thing. I commend Senator Proxmire for his past efforts and look forward to working out the remaining flaws in S. 414.

Senator Proxmire should be congratulated for his willingness to consider language which could make the law more practical and more beneficial to the public in its application.

I think it is important for us to move forward. I would hope that we are able to report out a bill along the lines that Senator Heinz has suggested and that the committee process in terms of working out the various agreements with the House can be carried on. I think we can do that.

I thank you gentlemen for your testimony. I think it is important that we continue forward and that you can contact your various representatives, not only here in the Senate but in the House. I think what you are saying is that you want a reasonable law; we do not want a law that will open the doors to bribery.

I think passage of S. 414 should be a priority, I don't think this is such a complex matter that it cannot be solved. We can protect the American public, provide relief to honest businessmen, and see to it that we do not open up the floodgates to those who would subvert the process.

Thank you very much for your participation.

(Whereupon, the hearing was adjourned at 4:55 p.m.)

[Additional material for the record follows:]

NATIONAL FOREIGN TRADE COUNCIL, INC.,
New York, N.Y., March 2, 1983.

Hon. JOHN HEINZ,
Chairman, Subcommittee on International Finance and Monetary Policy, U.S. Senate, Washington, D.C.

DEAR SENATOR HEINZ: In support of your proposal for amendment of the Foreign Corrupt Practices Act, the National Foreign Trade Council would like to propose for your consideration a modified approach to the amendment of Section 104, concerning Foreign Bribery.

In essence, we suggest that Subsection 104(a) should provide that in order for a foreign payment to constitute a violation, the payor must have acted with "corrupt" intent. This would make it unnecessary to describe, in Subsection 104 (c), certain exemptions, for facilitating payments, travel expenses and other lawful payments. We believe that listing these exemptions in the Act could have the effect of outlawing other ordinary payments, not so listed. Attached is a detailed explanation of this proposal, which has been developed after long and careful study by the NFTC Subcommittee on Foreign Corrupt Practices, chaired by Frank H. Roberts, Esq., senior partner of Pillsbury, Madison & Sutro, San Francisco.

The Council endorses many of the provisions of the Business Accounting and Foreign Trade Simplification Act (S. 414), as introduced by you, but we believe that amendment of the bill along the lines suggested would, without weakening the prohibitions against bribery, clarify the law and make it more enforceable.

Hoping you will find our suggestion a constructive one, we applaud your efforts and those of Senator Chafee and other co-sponsors to correct the defects in the present law.

It is respectfully requested that this letter be made part of the record of hearings of S. 414 held on February 24, 1983 by Subcommittees on Securities and International Finance and Monetary Policy.

We appreciate the opportunity to submit these views for your consideration.

Sincerely,

RICHARD W. ROBERTS, *President.*

RECOMMENDATIONS BY NFTC SUBCOMMITTEE ON FOREIGN CORRUPT PRACTICES FOR
AMENDMENT OF S. 708.

The uncertainties under the FCPA which have been so troublesome to business stem from doubts created about the efficacy of the corrupt intent requirement and from the awkward and ambiguous language of the statute. S. 708 attempts to deal with these problems by introducing additional details which in all likelihood will produce new uncertainties and confusions. Instead, the FCPA should be simplified by eliminating confusing and unnecessary language, while carrying forward the essential elements of the basic proscription against foreign bribery.

The following is the recommended amendment of S. 708 as passed by the Senate on November 21, 1981:

FOREIGN PAYMENTS

"Sec. 10¹. (a) It shall be unlawful for any domestic concern, or any officer, director, employee, or shareholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or any means or instrumentality of interstate commerce corruptly in furtherance of a payment or offer of anything of value to a foreign official, directly or indirectly, to induce such foreign official to do or omit to do any act in violation of his legal duty as a foreign official, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person."

(Subsections (b) and (c) would be eliminated as unnecessary, and Subsections (d) through (g), regarding penalties, definition of "domestic concern," etc., would be retained, as would the accounting standards and other sections of S. 708.)

There are four critical elements in this formulation:

(1) In order for a foreign payment to constitute a violation, the payor must have acted with "corrupt" intent. This is consistent with the legislative history, which makes it clear that in order to violate the FCPA, the person charged must act with evil motive or purpose or with an intent to wrongfully influence the recipient.

(2) The words "directly or indirectly" are included to make it clear that a payment or offer made to a foreign official through a third party (including a subsidiary or an affiliate) or by any "indirect" means will subject the payor to liability on the same basis as if the payment or offer were made directly. This phrase substitutes for the "reason to know" or "direct or authorize" formulations and establishes the simple standard that a domestic concern is liable for a third party's payment of a bribe when the domestic concern acts in regard to a third party with corrupt intent.

(3) In order for a violation to take place, the purpose of a payment or gift must be to induce the foreign official to violate his legal duty as a foreign official. (This would encompass any wrong-doing by a foreign official in attempting to influence any act or decision of his government.) This requirement is entirely consistent with the legislative history of the FCPA and with a "corruptly" concept. It makes clear that the determination whether a payment or offer is made "corruptly" is to be made in the context of the laws of the foreign official's country, which, of course, may differ considerably from laws of other countries, including the United States.

(4) The foregoing formulation does not contain a specific "grease" payments exception or any other specific type of exclusion. To the extent that "grease" payments—or any other payments—do not involve "corrupt" intent on the part of the payor and do not induce a foreign official to violate his legal duty, no violation is involved and therefore no specific exclusion is required.